No. 82-1071

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

ALUMINUM COMPANY OF AMERICA, et al.,
Petitioners,

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, et al.,
Respondents,

and

PETER JOHNSON, as Administrator of the BONNEVILLE POWER ADMINISTRATION, Department of Energy, and DONALD PAUL HODEL, as Secretary of the DEPARTMENT OF ENERGY, and the UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX

M. LAURENCE POPOFSKY
COUNSEL OF RECORD
ERIC REDMAN
PETER A. WALD
DIAN M. GRUENEICH
HELLER, EHRMAN, WHITE & MCAULIFFE
44 Montgomery Street
San Francisco, CA 94104
Tel.: (415) 772-6000
Counsel for Petitioners Aluminum Company of America, et al.

JAY T. WALDRON
DONALD A. HAAGENSEN
SCHWABE, WILLIAMSON, WYATT, MOORE & ROBERTS
1200 Standard Plaza
Portland, OR 97204
Tel.: (503) 222-9981
Attorneys for Respondents Central Lincoln Peoples' Utility District, et al.

APPEAL DOCKETED DECEMBER 22, 1982
PROBABLE JURISDICTION NOTED MARCH 28, 1983

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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Appendix I	Letter of BPA Administrator to Hon. Abraham B. Kazen (Aug. 19, 1980)
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Appendix N	DSI Contract (1975) Sections 4, 7, General Contract Provisions, Section 8(b)

Docket Entry No. 81-7561

United States Court of Appeals
For the Ninth Circuit

Petition for Review

Oregon (Portland)

Central Lincoln Peoples' Utility District; City of Eugene, By the Eugene Water & Electric Board; et al.,
Petitioners,

vs.

Peter Johnson, as Administrator of the Bonneville Power Administration, Dept. of Energy, James Edwards, as Secretary of the Dept. of Energy, and the U.S.A.
Respondents.

Public Power Council, et al,
Intervenors.

Related to: 81-7618, 81-7622, 81-7627,
81-7629, 81-7632, 81-7633, 81-7635/36/37

For Petitioner:
Jay T. Waldron, Esq. of Schwabe, Williamson, Wyatt, Moore & Roberts
Ph: 503/222-9981

For Respondent:
Peter Johnson, (Bonneville Power)
Sidney Lezak, U.A. Attorney
James Edwards, Secretary of Energy

Date	FILINGS-PROCEEDINGS
1981	
Aug 31	Paid fee. -vt-
Aug 31	Filed orig & three petition for review of an order of the Dept. of Energy, et al., (Civatt)
Aug 31	Filed motion for temporary injunction and for order to show cause with exh's. (Civatt) -vt-
Aug 31	Docketed cause & entd appearance of counsel. -vt-
Aug 31	Notified counsel for the respondent & issued copies. -vt-
Sep 8	Filed (Public Power Council) motion for leave to intervene. (Civatt) -vt-
Sep 9	Filed, as of Sep 8, respondents' memorandum in opposition to motion for temporary injunction or stay pending review. (Civatt) 9/4 -dmf-
Sep 9	Filed petitioners' memorandum in response to questions by court on injunctive relief issues and suppl. brief. (Civatt) 9/8 -dmf-
Sep 9	Filed affidavits of Peter T. Johnson, et al, in support of respondents' opposition to motion for temporary injunction. (Civatt) 9/8 -dmf-
Sep 9	Filed, as of Sep 8, motion (Direct-Service Industrial Customers) to intervene. (Civatt) 9/4 -dmf-
Sep 11	Filed, as of Sep 10, order (Goodwin, Skopil) the motion of the Public Power Council to intervene as plaintiff and the motions of Aluminum Company of America, et al, to intervene as defendants are granted. Petnrs' request for stay pending review is denied. Requests for expedition are granted. The parties shall adhere to the following schedule: a) the admin record

Date	FILINGS-PROCEEDINGS
	shall be filed by September 24, 1981. b) Plaintiffs and plaintiff-intervenors shall file their opening briefs on or before October 1, 1981. c) Defendants and defendant-intervenors shall file their answering briefs on or before October 8, 1981. d) Plaintiffs and plaintiff-intervenors may file their reply briefs on or before October 14, 1981. e) no ext of time to his briefing schedule will be granted, absent extraordinary circumstances. Any objections to the briefing schedule contained in this order shall be filed with the Court on or before September 15, 1981. f) all further documents shall be filed in the Clerk's Office in San Francisco, except that any objections to the briefing schedule shall also be filed in the chambers of Judges Goodwin and Skopil. The Clerk shall attempt to calendar this case in November, 1981 before a regular panel of the Court. -dmf-
Sep 11	Rec'd, as of Sep 10, witness statements of Donald E. Long, Gerald R. Garman and Eugene W. Lubking. (panel & Civatt). -dmf-
Sep 11	Rec'd, as of Sep 10, reply memorandum of Direct Service Industries, affidavit of Bruce E. Mizer and DSI Answers to Court Questions. (panel & Civatt) -dmf-
Sep 18	Filed as of Sep 14 four copies of brief of Amicus Curiae (State of Oregon). 9/9 -dmf-
Sep 18	Filed, as of Sep 16, plaintiff-intervenor's objection to briefing schedule. (copy to Civatt) 9/15 -dmf-
Sep 18	Filed, as of Sep 16, plaintiff's objection to briefing schedule. (copy to Civatt) 9/15 -dmf-

Date	FILINGS-PROCEEDINGS
Sep 18	Filed, as of Sep 17, motion (Pudget Sound Power & Light Company) for leave to intervene. (copy to Civatt) 9/15 -dmf-
Sep 18	Filed, as of Sep 17, motion (Portland General Electric) for leave to intervene. (copy to Civatt) -dmf-
Sep 18	Filed, as of Sep 16, order (Goodwin, Skopil) 1) the motions of Portland General Electric Company and Puget Sound Power & Light Company to intervene as plaintiffs are granted. 2) Upon due consideration of the documents rec'd by 9/15/81, objecting to the briefing schedule set in order of 9/10/81, the briefing schedule is hereby modified. The parties shall adhere to the following schedule: a) the admin. record shall be filed by September 24, 1981. b) Objections and request to suppl. the record shall be filed by October 9, 1981. c) plaintiffs and plaintiff-intervenors shall file their opening briefs on or before October 30, 1981. d) Defendants and defendant-intervenors shall file their answering briefs on or before November 13, 1981. e) Plaintiffs and plaintiff-intervenors may file their reply briefs on or before November 20, 1981. f) No extensions of time to this briefing schedule shall be granted, absent extraordinary circumstances. 3) the Clerk shall attempt to calendar this case in January, 1982 before a regular panel of the court. -dmf-
Sep 21	Filed motion (Direct Service Industrial Customers) to reconsider. (Civatt) 9/17 -dmf-
Sep 21	Filed respondent's request for consideration of order granting leave to intervene. (Civatt) 9/17 -dmf-

Date	FILINGS-PROCEEDINGS
Sep 21	Filed petnrs' memorandum in opposition to rspdt's request for reconsideration. (Civatt) 9/18 -dmf-
Sep 21	Filed petitioners' motion for joinder for Elkem Metals Company. (Civatt) -dmf-
Sep 21	Filed petitioners' motion for joinder for Stauffer Chemical Company. (Civatt) -dmf-
Sep 21	Filed petitioners' statement of joinder. Civatt) 9/21 -dmf-
Sep 21	Filed petnrs' amendments to original complaint. (Civatt) 9/21 -dmf-
Sep 21	Filed respondents' request for consideration of order granting petnrs' objections to briefing schedule. (Civatt) -dmf-
Sep 22	Filed, as of Sep 21, order (Goodwin, Skopil) the government's motion of September 17, 1981 and the direct service industrial customers' motion of September 17, 1981 seeking reconsideration of the court's order of September 10, 1981 are denied. -dmf-
Sep 23	Rec'd letter dated 9/22/81 from petitioner counsel requesting that case be heard in Portland, Oregon. (Civatt, Calatt) -dmf-
Sep 24	Filed Cert. Inventory of the Official Record, Orig. only. (to Civatt w/three boxes of attachments.) -dmf-
Sep 28	Filed motion (Stauffer Chemical Co. and Elkem Metals Co.) to intervene as defendants. (Civatt) 9/25 -dmf-
Sep 28	Filed motion (Kaiser Aluminum & Chemical Corp.) for correction of corporate name. (Civatt) 9/25 -dmf-
Sep 28	Filed motion (CP National Corp.) for leave to intervene. (Civatt) 9/25 -dmf-

Date	FILINGS-PROCEEDINGS
Sep 28	Filed motion (Montana Power Co.) for leave to intervene. (Civatt) -dmf-
Sep 28	Filed motion (Idaho Power Company) for leave to intervene. (Civatt) 9/29 -dmf-
Sep 30	Filed motion (Pacific Power & Light Company) for leave to intervene. (Civatt) 9/29 -dmf-
Oct 5	Filed, as of Oct 2, order (Goodwin, Skopil) a) the motion of Kaiser Aluminum & Chemical Corp. for correction of corporate name is granted; b) Stauffer Chemical Co. and Elkem Metals Co. are granted leave to intervene as defendants. Motion for joinder is denied as moot; c) CP National Corp., Montana Power Company, Idaho Power Company and Pacfic Power & Light Company are granted leave to intervene as plaintiffs; d) intervenors shall file their briefs in accordance with the briefing schedule set forth in the court's order of September 16, 1981; and e) the clerk shall attempt to calendar this matter for hearing in Portland, Oregon. -dmf-
Oct 7	Filed respondents' motion to quash petnr's request for production of documents. (Civatt w/attachment) 10/5 -dmf-
Oct 9	Filed intervenor's (Public Power Council) motion for ext of time for objections to and requests for supplementation of the admin. record. (Civatt) 10/8 -dmf-
Oct 13	Filed intervenors' (PG&E, et al) motion for ext of time for objections to and requests form supplementation of the admin. record. (Civatt) 10/9 -dmf-
Oct 13	Filed petnrs' objection to record and request for supplementation. (Civatt) 10/9 -dmf-

Date	FILINGS-PROCEEDINGS
Oct 19	Filed respondents' memorandum in opposition to intervenors' motions for ext of time. (Civatt) 10/16 -dmf-
Oct 21	Filed respondents' memorandum in opposition to petnrs' request to suppl. the record. (Civatt) 10/18 -dmf-
Oct 21	Filed intervenors' memorandum opposing petnrs' requested relief and supporting govt.'s motion to quash. (Civatt) 10/19 -dmf-
Oct 22	Filed intervenors response to motion to quash. -ho (Civatt) 10/20
Oct 23	Filed order (Goodwin, Skopil) 1) intervenors may file objections to and requests for supplementation of the record on or before 7 days from the entry of this order. 2) intervenors motion for ext of time to respond to the govt's motion to quash is granted and the response heretofore rec'd is ordered filed. 3) The govt's motion to quash is granted in part and denied in part. 4) Public Power Council's motion to ext the briefing schedule is denied. The parties shall adhere to the briefing scheduled established in our order of September 16, 1981. -dmf-
Nov 2	Rec'd ltr dated 10/30/81 from plft/intervenor re filing an answering or reply brief. (Civatt) -vt-
Nov 2	Filed public Power Council adoption of Central Lincoln Peoples brief. ***** -vt-
Nov 2	Filed plft/intervenor motion for leave to file second amended complaint. (Civatt)
Nov 2	Rec'd Plft/intervenors second amended complaint. (Civatt) -vt-
Nov 2	Filed orig only of preference customer memorandum. (Civatt) -vt-

Date	FILINGS-PROCEEDINGS
Nov 2	Filed (PG&E) Motion to suppl. record with suppl attached. (Civatt) -vt-
Nov 2	Filed (PG&E) orig & 6 copies of the brief.
Nov 2	Filed petrs resp response to order directing production of documents. (Civatt) -vt-
Nov 4	Rec'd (PG&E) suppl Appendix to record. -vt- ***
Nov 4	Filed resp (Bonneville Power) In Camera Inspection of Privileged Documents in two vol. & two copies each. (Civatt) -vt-
Nov 4	Rec'd ltr dated 10/30/81 from Bonneville re errors in privileged documents. (Civatt)
Nov 6	Filed resp (Bonneville) memorandum opposing petr/intervenor motion regarding supplementation of and deletions from the contract official records. (Civatt) -vt-
Nov 12	Field (Portland General) supplemental memorandum re: deletions from record. Calendared Portland (Civatt) -vt-
Nov 13	Recvd from Portland Gen. Elec. 7 add'l copies of Opening Brief of Plaintiff-Intervenors Investor-Owned Utilities filed Nov. 2, 1981, and 7 add'l copies Submission re Supplementation of and Deletions from the Record, filed Nov. 2, 1981. -mlm-
Nov 16	Rec'd add'l 8 copies of pet's Preference Customer Memorandum filed Nov. 2, 1981. -mlm-
Nov 16	Rec'd add'l 7 copies of brief of Amicus Curiae (State of Oregon) filed Sept. 14, 1981. -mlm-
Nov 16	Filed orig & 15 copies of resp-intervenors answering brief (48pp.) (11/13), to panel. ck
Nov 17	Filed, as of 11/6/81, Order (Goodwin & Skopil) (1) Pltfs' motion for leave to file a second amended complaint is granted, and the second amended complaint, heretofore rec'd, is

Date	FILINGS-PROCEEDINGS
	ordered filed. (2) Upon consideration of pltf-intervenor investor owned utilities' motion regarding supplementation of and deletions from the official record and the gov'ts opposition (a) the four documents, exhibits C-F of pltf-intervenors' request, are ordered added to the record and (b) pltf-intervenor investor owned utilities' request to delete certain material from the record is referred to the panel that hears this case on the merits. (3) The index and documents submitted to this court for *in camera* inspection to determine claims of privilege are insufficiently marked to enable this court to rule on the claims. BPA is hereby ordered to provide an adequate index, to mark each document so it can be located via the index, to mark the section for each document for which a privilege is claimed, and to give supporting reasons for each claim of privilege. This material shall be filed no later than November 13, 1981. (4) Pltfs' motion to compel production is referred to the merits panel. (5) All opening briefs, heretofore rec'd, are ordered filed. The merits panel may request add'l copies of briefs. ck
Nov 17	Filed, as of 11/6/81, pltfs' second amended complaint. ck
Nov 18	as of 11/9/81 Filed (Central Lincoln) motion to compel production. (Civatt) -vt-
Nov 18	as of 11/12/81 Filed resp motion for ext of time to reply to motion to compel. (Civatt)
Nov 18	as of 11/17/81. Filed (Bonneville Power) answering brief with attachments. (50p) (panel) -vt-

Date	FILINGS-PROCEEDINGS
Nov 19	Filed, as of 11/17/81, Order (Goodwin & Skopil) Respondents are granted an ext. of time until November 20, 1981 in which to respond to petitioners' motion to compel production and to file a revised index for privileged materials. ck
Nov 23	Rec'd, as of 11/19/81, letter dated 11/16/81 from Thomas C. Lee, AUSA, re: delay in delivery of brief due to postal service problems. ck
Nov 23	Filed orig & 3 copies of reply memorandum of preference customer, to panel. 11/20/81 ck
Nov 23	Filed petnrs' motion to supplement the record with memorandum of Bernard Goldhammer and affidavit of Gerald R. Garman, with attached copies of said documents, to panel. 11/20/81 ck
Nov 23	Filed resps' (USA, et al.) memorandum in support of claims of privilege and in opposition to motion to compel production, to panel. 11/20/81 ck
Nov 23	Filed 3 sets of revised compilation of documents for which privileges are claimed, to Civatt. (panel notified that documents available) ck
Nov 25	Filed, as of 11/23/81, orig & 15 copies of pltfs/intervenors-owned utilities reply brief, to panel. (15 pp) (11/20) ck (copies also to Civatt)
Nov 25	Filed pltf/intervenors investor-owned utilities motion for an order excluding certain claims, to panel and Civatt. 11/25/81 ck
Nov 30	Rec'd letter dated 11/25/81; from Jay T. Waldron, re: complete copy of the Bernard Goldhammer Memorandum attached to pltfs' motion, to panel and Civatt. 11/25/81 ck

Date	FILINGS-PROCEEDINGS
Nov 30	Filed motion of pltfs' to permit filing of substitute pages for three of the pages in pltfs' preference customer reply memorandum, to panel and Civatt. 11/25/81 ck
Dec 2	Filed resp/intervenors memorandum in opposition to petnrs' motion to supplement the official record, to panel and Civatt. 12/1/81 ck
Dec 2	Filed resps' memorandum in opposition to petnrs' motion to supplement the official record, to panel and Civatt. 11/30/81 ck
Dec 3	as of 12/1/81 Order (Browning) plfts motion to substitute pages in reply memorandum is granted. -vt-
Dec 15	Filed, as of 12/7/81, pltfs' memorandum in support of motion to compel production, to panel & Civatt. 12/4/81 ck
Dec 15	Filed, as of 12/7/81, resps' statement on motion for an order excluding certain claims, to panel and Civatt. 12/4/81 ck
Dec 15	Filed, as of 12/8/81, statement of resp-intervenors on motion for an order excluding certain claims, to panel and Civatt. 12/7/81 ck
Dec 15	Filed, as of 12/14/81, memorandum of preference customers in support of motion to supplement the record, to panel and Civatt. 12/11/81
Dec 23	Filed, as of 12/22/81, Order (Browning, Wallace, Boochever) The Honorable George E. Juba, U.S. Magistrate, is appointed special master to make findings and recommendations on the pending motions to compel production of documents, including documents submitted to this court for *in camera* inspection. The parties may file objections to such findings and recommendations by January 4, 1981. ck

Date	FILINGS-PROCEEDINGS
Dec 28	Rec'd, as of 12/18/81, letter dated 12/15/81 from Alvin Alexanderson, PGE, re: allocation of time for plaintiffs-intervenors at oral argument, referred to panel. 12/15/81 ck
Dec 28	Filed, as of 12/24/81, Report of Special Master (Juba) re: motions to compel production, etc. (see casefile) (panel and parties served 12/24/81) ck
1982	
Jan 4	Filed, as of 12/28/81 in 81-7806, motion of the Public Power Council, et al. to intervene in, consolidate, and exclude certain claims from suits, to panel and Civatt. 12/23/81 ck
Jan 4	Filed preference customers plaintiffs objection to report of magistrate, to panel and Civatt. 12/30/81 ck
Jan 4	Filed industrial customers' response to Public Power Council's motion to intervene in, consolidate, and exclude certain claims, to panel and Civatt. 12/31/81 ck
Jan 5	Filed, as of 1/4/82, Order (Browning, Wallace & Boochever) Pltf-Intervenors investor owned utilities may have five minutes for oral argument at the hearing of this case. The time of the other parties shall not be reduced. ck
Jan 7	Filed, as of 1/6/82 in 81-7561, resps' memorandum opposing petnrs' motion to intervene in, consolidate, and exclude certain claims, to Civatt (copies sent to merits panel in 81-7561 by U.S. Atty). 1/4/82 ck
Jan 7	Filed, as of 1/6/82 in 81-7561, corrected motion of the Public Power Counsel, et al., to intervene in, consolidate and exclude certain claims, to Civatt (and merits panel in 81-7561). 1/5/82 ck

Date	FILINGS-PROCEEDINGS
Jan 7	Filed, as of 1/6/82, resps' supplemental certificate of related cases for resps' brief, to panel. 12/30/81 ck (federal resps')
Jan 7	Filed, as of 1/6/82, resps' (Federal resps') correction to their brief, to panel. 1/5/82 ck
Jan 6	Argued and submitted to: Browning, Wallace & Boochever; CJJ. -jm
April 8	As of 4/7/82, ordered opinion (Boochever) filed & judg to be filed & entd. ck
April 8	As of 4/7/82, filed opinion—remanded. ck
April 8	As of 4/7/82, filed and entered judgment. ck
April 16	Filed, as of 4/15/82, resps' motion for ext of time to file petition for rehearing and to stay issuance of mandate. 4/14/82 ck
April 16	Filed Order (Deputy Ck. for Ct) granting resps' motion for ext of time to file petition for rehearing to May 21, 1982. ck
April 22	Filed petnrs' (Central Lincoln, et al.) bill of costs, to Civatt. 4/20/82 ck
April 22	Filed resps'/intervenors (Aluminum Co. of America, et al.) petition for rehearing and suggestion for rehearing en banc, to panel and all active judges. 4/20/82 ck
April 28	Rec'd, as of 4/27/82, resps' amendment to memorandum submitted in support of resps' motion for enlargement of time to file petition for rehearing and to stay issuance of mandate (no action necessary, ext. of time already granted). 4/26/82 ck
May 3	Filed resps' motion for enlargement of time to file objection to bill of costs. -ho-
May 3	Filed objection to petnr's bill of cost. -ho- (BPA)

Date	FILINGS-PROCEEDINGS
May 18	Rec'd, as of 5/17/82, notice of appearance of Bruce G. Forrest and Robert S. Greenspan as additional counsel for federal resps. 5/14/82 ck
May 20	Filed orig & 32 copies of resp's (Johnson, et al) petition for rehearing and suggestion for rehearing en banc, to panel and all active judges. 5/19/82 ck
Jun 22	Filed order (Browning) Petrs are requested to respond to resps' petition for rehearing and suggestions for rehearing en banc on or before July 7, 1982. -vt-
July 9	Rec'd, as of 7/8/82, orig & 5 copies of petnrs' (preference customers) response to petition for rehearing (insufficient copies rec'd—notified counsel to send add'l copies), to panel (copies will be distributed to all active judges upon receipt) 7/7/82 ck
July 12	Filed orig & 35 copies of petnrs' (preference customers) response to petition for rehearing (copies to be substituted for those rec'd 7/8/82), filed per Judge Browning, to panel and all active judges. 7/8/82 ck
July 14	Rec'd letter dated 7/12/82 from Donald A. Haagensen, re: through clerical error the petnrs' response to the petition for rehearing, etc., was slow in arriving in the Clerk's Office (no action necessary—response already filed). ck
July 16	Filed fed. resps' motion for leave to file a limited reply to preference customers' response to petition for rehearing and suggestion for rehearing en banc, to panel and all active judges. 7/15/82 ck

Date	FILINGS-PROCEEDINGS
July 16	Rec'd orig & 35 copies of fed resps' reply to preference customers' response to petition for rehearing, to panel and all active judges. 7/15/82 ck
July 27	Rec'd, as of 7/26/82, letter dated 7/22/82 from Alan S. Larsen, Esq. and Wm. David Sprayberry, Esq., re: opposition to resp's motion for leave to file a limited reply to response to petition for rehearing, etc. (counsel notified to send add'l copies for distribution), copies referred to panel. 7/22/82 ck
July 30	Rec'd, as of 7/29/82, 30 add'l copies of letter of Alan S. Larsen, Esq.: opposition to resp's motion for leave to file a limited reply response, et al., distributed to all active judges. ck
Sep 7	Filed order (Goodwin & Skopil) The panel in the above-entitled case has agreed to amend the opinion as follows: 1. Insert new footnote at page 6, line 32, stating: 4. We find no support for the contention that 5(d) (1) (B) guarantees the nonfirm power needed to serve the DSIs' first quartile. Section 5(d)(1)(B) expressly links the DSIs' present allocation to their entitlement under the 1975 contracts. It is undisputed that under the 1975 contract the DSIs' received nonfirm power only after the preference customers filled their nonfirm needs. Thus, subsection (B) does not entitle the DSIs' to nonfirm power for the first quartile under the contracts now at issue. Moreover, 5(g)(7) does not alter this conclusion because it does not grant the DSIs' any greater entitlement than what they received under the 1975 contracts. 2. Renumber all sub-

Date	FILINGS-PROCEEDINGS
	sequent footnotes and signals. 3. Change footnote 10 (old footnote 9) to read: 10. Because we find that the priority given the DSIs' for nonfirm power violates the preference provisions of the act, we need not determine whether BPA failed to follow required procedures in adopting its interpretation of the Act. -ho-
Sep 21	Filed resp intervenors (DIS) motion for leave to file suppl. pleadings. (panel & all active) -vt-
Sep 21	Rec'd orig & 33 copies of resp intervenors (DIS) supplement to petition for rehearing & suggestion for rehearing en banc. (panel & all active) -vt-
Sep 27	Filed order (Browning, Wallace & Boochever) The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected. -vt-
Sep 29	Filed resp/intervenors motion to stay mandate. (panel) -vt-
Sep 29	Filed resp/intervenors emergency motion to stay mandate. (panel) -vt-
Oct 1	Filed (PGP) response to emergency motion to stay manadate. (panel) -vt-
Oct 4	as of 9/29/82 Filed order (Browning) The emergency motion to stay mandate is so ordered. -vt-
Oct 4	Filed resp memorandum of law in response to resp/intervenors emergency motion to stay mandate. (panel) -vt-
Oct 6	Filed Public Power Council response to motion filed by Industrial Customers to stay mandate. (panel) -vt-

Date	FILINGS-PROCEEDINGS
Oct 12	The issuance of the mandate in this case is stayed until fourteen (14) days after the United States Supreme Court finally disposes of the case. This stay is conditioned upon the respondent-intervenor industrial customers applying for a writ of certiorari within ninety (90) days from the entry of judgment by this court, good cause having been shown for granting a stay in excess of thirty (30) days. -ho-
Oct 18	Rec'd Resp's objection to Petnr's bill of cost with motion to file late. -ho-
Oct 27	Filed Petnr's (Preference Customers') Response to BPA's objection to bill of cost. (Civatt) -ho-
Nov 12	Filed Order (Browning, Wallace & Boochever) Motion for leave to file supplementary pleading is granted, and the supplement to DSI Petition for rehearing and suggestion for rehearing en banc shall be filed by the clerk. The order of September 27, 1982, denying the petition for rehearing and rejecting the suggestion for rehearing en banc remains in effect. -ho-
Dec 3	Filed motion to dismiss as to Stauffer Chemical Company (panel) jt
Dec 23	Filed Resp/intervenor (DSI) certificate of compliance with order re stay of mandate with appendix. (panel) -vt-
1983	
Jan 17	Filed order (Browning, Wallace & Boochever) The motion to dismiss this appeal as to Stauffer Chemical Company only is granted. -vt-
Mar 31	Filed cert. copy of SC order granting certiorari on Mar. 28, 1983. (Panel) ag

MEMORANDUM IN OPPOSITION TO MOTION FOR TEMPORARY INJUNCTION OR STAY PENDING REVIEW

[Filed Sept. 8, 1981]

In the United States Court of Appeals
For the Ninth Circuit

No. 81-7561

[Case omitted in printing.]

TABLE 1[1]

Industrial Purchaser	Terminated IF Contract Demand July 1, 1982[2]	Authorized Increases July 1, 1982	Technological Allowances	New Contract Demand[3]
Alcoa	586.0 MW		14. MW	600.0
Anaconda	421.8		3.7	427.5[4]
Carborundum	29.75	1.8 MW	2.45	34.0
Crown Zellerback	13.6	3.0		16.6
Georgia Pacific	34.44			34.40
Hanna	113.28	2.0		115.20
Intalco	436.0	9.6[5]		445.6
Kaiser	715.1		22.43	737.53
Martin Marietta	426.9		22.816	453.516[6]
Ormet	18.0			18.0
Pacific Carbide	8.0	1.0	.309	9.297
Pennwalt	55.33	28.7		84.0
Reynolds	689.5	7.9	3.3	700.7
Stauffer	79.8			79.8
Union Carbide/Elkem	18.7	11.3		30.
	3646.20	65.3	69.005	3786.143

[1]There are differences between this table and petitioners' table because the petitioners' table includes authorized increases in the existing contract demands in some cases, while ignoring them in other cases. In addition, the contract demands in the petitioners' table do not include technological allowances.

[2]These demands are from § 4 in Exhibit A in Exhibit Q to the Complaint, also referred to as the Industrial Firm, or "IF" Contracts.

[3]In certain cases, the new contract demand has been adjusted *downward* from the entitlement to correspond to the multiplier built into the meter installed at the industrial purchaser's plant. Please note the distinction, as provided in the new contract, with contract demand established as the upper limit which may not be exceeded by the purchaser's Operating Demand and operating level.

[4]This includes an adjustment for 2.0 MW of transmission losses that are no longer incurred following settlement of the at-site power rate with Anaconda.

[5]This results from service of Additional Power as provided for in the interim IF Contracts.

[6]This includes an adjustment for 3.8 MW of transmission losses that are no longer incurred following settlement of the at-site power rate with Martin Marietta.

TABLE II
COMPARISON OF SECOND QUARTILE RESTRICTION RIGHTS

Basis for Restriction	Mid-Year Restriction		Subsequent-Year Restriction		Government Order	
	Terminated 1975 Contracts	New Contracts § 7(d)(2)	Terminated 1975 Contracts § 8(d) Exhibit C	New Contracts § 7(d)(1) & (2) & 7(f)	Terminated 1975 Contracts § 8(d) Exhibit C	New Contracts § 7(d)(1)(C)
Delay of Plant	No	Yes[1] (½ of Outage)	Yes	Yes[2]	Yes	Yes[3]
Unexpectedly Poor Performance:						
—Failure to Attain Designed Capability	No	Yes (½ of Outage)	Yes	Yes	Yes	Yes
—Forced Outage after Attaining Commercial Operation	No	Yes (½ of Outage)	No	Yes (½ of Outage)	No	No

[1]In cases where restrictions are shown to one-half of the outage, the Administrator may restrict up to one-half the amount of energy by which he estimates that he will be unable to meet his firm obligations. This occurs before applying additional acquisitions of energy against such deficit, and these acquisitions apply first to the Administrator's (i.e., the region's) share of the deficit.

[2]The Administrator has placed a 7-year limit on his ability to restrict for the delay of any resource. This is consistent with BPA's ability to acquire replacement resources on a planning basis and the planning assumptions for notices of insufficiency and service of new large loads contained in the utility contract. The obligation to treat the Second Quartile as a firm load for purposes of resource planning existed before the new contracts, but was not explicitly related to the 7-year planning period.

[3]The new contracts except laws or ordinances enacted by legislative bodies and ballot measures as a basis for restriction due to governmental order. The Regional Act requires the DSI's to provide reserves for the failure of planned resources BPA is relying upon. A ballot measure or legislative action to terminate a resource is, in effect, a decision to unplan a resource; the DSI's do not provide a reserve for this contingency; utilities, themselves, do not provide reserves for this contingency.

SECOND AMENDED COMPLAINT

[Filed Nov. 2, 1981]

In the United States Court of Appeals
For the Ninth Circuit

No. 81-7561

[Case omitted in printing.]

I
JURISDICTION

This action arises under 16 U.S.C. § 832-832l (Bonneville Project Act), 16 U.S.C. § 838f (the Federal Columbia River Transmission Act), 16 U.S.C. § 825s (Flood Control Act), P.L. 96-501 (Pacific Northwest Electric Power Planning and Conservation Act, hereinafter referred to as the "Regional Act"), and 5 U.S.C. § 704 (Administrative Procedures Act).

This court has jurisdiction under Section 9(e)(5) of P.L. 96-501, and has the authority to grant the relief requested under 5 U.S.C. § 702 and 28 U.S.C. §§ 2201, 2202 (Declaratory Judgment Act). The amount in controversy exceeds $10,000, exclusive of interest and costs.

II
VENUE

The United States Court of Appeals for the Ninth Circuit is a proper venue for this action under P.L. 96-501 § 9(e)(5) which provides that suits challenging final determinations by the Bonneville Power Administrator (Administrator) taken pursuant to the Regional Act shall be filed in the United States Court of Appeals for the region.

III
PARTIES

Public Utility District No. 1 of Chelan County, Public Utility District No. 1 of Cowlitz County, Public Utility District No. 1 of Douglas County, Public Utility District No. 1 of Snohomish County, and Public Utility District No. 2 of Grant County are municipal corporations organized and existing under the laws of the State of Washington. Central Lincoln Peoples' Utility District, Clatskanie Peoples' Utility District, Northern Wasco County Peoples' Utility District, and Tillamook Peoples' Utility District are public corporations organized and existing under the laws of the State of Oregon. The Eugene Water & Electric Board is a part of the City of Eugene, a municipal corporation organized and existing under the laws of the State of Oregon. The City of Seattle, City Light Department and the City of Tacoma, Department of Public Utilities are departments of their respective cities which are municipal corporations organized and existing under the laws of the State of Washington.

These plaintiffs provide electric service to over 750,000 customers and approximately 2 million people in their service areas. The Bonneville Power Administration (BPA) sells approximately 25% of its total sales of electric energy to these plaintiffs. Several of these parties generate electric power and all purchase substantial amounts of wholesale electric power and energy from BPA as public bodies entitled to preference and priority within the meaning of 16 U.S.C. § 832c and § 825s and §§ 5(a) and 10(c) of the Regional Act.

Defendant Peter Johnson is the Administrator of the Bonneville Power Administration, an agency within the Department of Energy. Defendant James Edwards is the Secretary of the Department of Energy, an agency of the United States. Defendant United States of America is the

sovereign body in charge of the Department of Energy and the Bonneville Power Administration.

IV

DESCRIPTION

BPA markets for sale and distribution federally owned electric power in the Pacific Northwest. BPA markets wholesale power for resale by public bodies and cooperatives which are given preference to that power under various federal statutes.

BPA also markets power directly to fifteen corporations at their plants located in the Northwest. These corporations, plus Alumax, are known as BPA's direct service industrial customers (industrial purchasers). On August 28, 1981, BPA offered new power sales contracts, which are attached and marked as Exhibits A through P, to the industrial purchasers. These contracts are intended to terminate existing contracts (the 1975 contracts) with the industrial purchasers. A representative 1975 contract is attached as Exhibit Q.

These industrial purchasers now consume approximately 35% of the power marketed by BPA, while paying approximately 25% of BPA's total revenues. The power that these industrial purchasers receive from BPA is divided into four quartiles or quarters of power. Electric power is kilowatts and kilowatt hours commonly called demand and energy.

Certain provisions of these contracts offered by the Administrator as they relate to nonfirm power sales violate the Administrator's statutory authority set forth in 16 U.S.C. § 832-832l, 16 U.S.C. § 838f, 16 U.S.C. § 825s, P.L. 96-501, 5 U.S.C. §§ 552, 704, and the rules and procedures of the Administrator at 45 Fed. Reg. 73,531 (1980).

V

STATUTORY VIOLATIONS

The Bonneville Project Act, as amended [16 U.S.C. § 832c(a) and § 832c(b)], provides that the Administrator shall at all times, in marketing federal energy, give preference and priority to public bodies and cooperatives, including these plaintiffs. The Flood Control Act [16 U.S.C. § 825s] and the Federal Columbia River System Transmission Act [16 U.S.C. § 838] reaffirm these preference and priority provisions. The Regional Act [P.L. 96-501] reaffirms this preference and priority in § 10(c) and other sections, and specifically provides in § 5(a) that all power sales by the Administrator pursuant to the Regional Act are subject to this preference and priority to public bodies and cooperatives.

Section 5(d)(1) of the Regional Act provides that under these new contracts offered to Industrial Purchasers, which must be offered simultaneously under § 5(g)(1) by the Administrator with new contracts offered to other specified customers, the industrial purchasers may only receive an amount of power equivalent to the amount that they were entitled to in their contracts dated January or April of 1975.

45 Fed. Reg. 73,531 (1980) provides that BPA meet certain requirements, including giving public notice and providing opportunity for public comment, for any change in federal marketing policy which will raise substantial legal or factual issues or is likely to have a substantial impact on the nation's economy or large numbers of individuals or businesses.

Sections 7(c), 7(e)(6), 8(a)(2) and 8(c)(9) of the new contracts violate the above statutory, procedural and administrative provisions. In offering these contract provisions the Administrator acted arbitrarily and capriciously and without jurisdiction.

VI

PLAINTIFFS' INTEREST

1. Acceptance of the new contracts and performance under those contracts would have a direct impact on plaintiffs' operation of their own power generating resources and on their production of power.

2. Acceptance of the new contracts and performance under those contracts would directly affect the cost and amount of power purchased by these plaintiffs, as preference and priority customers, from BPA, because the new contracts provide for revised priorities for nonfirm energy produced by the federal system and provide the industrial purchasers with more than an equivalent amount of power compared to their 1975 contracts.

3. Acceptance of the new contracts and performance under those contracts would increase the risk that these plaintiffs will be unable to adequately serve their customers.

4. Acceptance of the new contracts and performance under those contracts could result in permanent damage to several of plaintiffs' power generating resources because water reserves could be depleted under certain conditions to an extent beyond any practical likelihood of replacement.

5. Acceptance of the new contracts and performance under those contracts will adversely impact the plans of certain of the plaintiffs for the construction and operation of new power generating resources.

6. For each and all of the above reasons, plaintiffs are interested parties entitled to a declaratory judgment and further relief based thereon and are persons adversely affected by the action of the Administrator and entitled to judicial review thereof.

VII.

RELIEF REQUESTED

WHEREFORE, plaintiffs pray for a decree and order:

1. Declaring that certain provisions of the offered contracts are illegal and unauthorized and that these provisions have, in addition, been prepared and offered in violation of the Administrator's rules and procedures, and are without any effect whatsoever.

2. Enjoining the Administrator from performing according to certain provisions under the offered contracts if any industrial purchasers accept or attempt to accept the Administrator's offers.

3. Granting plaintiffs their costs and disbursement incurred herein.

4. Such additional or other relief as the court may deem just and equitable.

Respectfully submitted.
SCHWABE, WILLIAMSON, WYATT,
MOORE & ROBERTS

By: /s/ JAY T. WALDRON
Of Attorneys for Plaintiffs

I hereby certify that the
foregoing is a true copy
of the original hereof.

By: /s/ ALAN S. LARSEN
Of Attorneys for Plaintiff

(Exhibit B to Preference Customer Memorandum, filed Nov. 2, 1981)

DOE/EIS-0066

Excerpts From
Final Environmental Impact Statement
(Title Page, pages IV-71, IV-80, IV-85, and IV-86)

The Role of the Bonneville Power Administration
in the Pacific Northwest Power Supply System

Including Its Participation In A
Hydro-Thermal Power Program

U.S. Department of Energy
Washington, D.C. 20545

December 1980

Responsible Official
/s/ RUTH CLUSEN
Ruth Clusen
Assistant Secretary
for Environment

* * *

[IV-71]

c. *Secondary and Surplus Power Sales.*

(1) *Allocation of Nonfirm Power.*

Nonfirm energy is available when there is more than enough water in Federal reservoirs to meet the Federal system's firm energy commitment. The current secondary sales policy calls for the following priorities in the allocation of any secondary energy: (1) All firm energy loads will be served if any are not being met. This includes the bottom three quartiles of the direct-service industrial (DSI) load; (2) new reservoirs will be filled or depleted reservoirs restored; (3) public agencies' secondary power demands will be met, allowing them to refill their own reservoirs or displace thermal generation currently being used to serve their own loads; (4) when not all secondary demands can be met, the remaining energy is split approximately equally between the private utilities and the direct-service industries of the region; (5) after the top quartile of the DSI loads has been met, private utilities in the region can then purchase secondary energy to displace any of their remaining thermal generation which they have declared necessary for meeting firm loads under the Pacific Northwest Coordination Agreement; and (6) after all applicable regional loads have been met, and water cannot be considered for later use in the region, surplus power is made available for sale to the Pacific Southwest over the California Intertie.

It should be noted that this is an extremely dynamic situation and the status of power availability can vary not only from month to month and week to week, but also from hour to hour, depending upon a wide range of variables.

From 1968 to 1978, annual sales to California varied from a low of 0 MWh in 1973 to a high of 17,094,309 MWh in 1976. It is anticipated in future years that as the mar-

gin between projected loads and energy available under good water years declines, decreasing amounts of surplus energy will be available for sale outside the region.

Allocation priorities for surplus sales outside the region are similar to those inside the region; that is, preference customers in the Southwest have first call on the surplus energy.

* * *

[IV-80] meet load. BPA anticipates continuing to operate under the interim agreements, allowing service to each company to terminate on the expiration date of their modified firm power contract. These dates as well as each company's contract demand are presented in Table IV-12. (For informational purposes and in response to RDEIS comments, Figure IV-3 and Table IV-11 have been provided.)

BPA is currently developing an allocations policy which will address future service to all of the region's customers, including the DSIs. Discussion in this document is limited to the existing contracts. This section identifies and discusses the provisions of both the modified firm and industrial firm power contracts and the impacts of these sales on the power system. Site-specific impacts of the plants themselves are covered at the end of the section. (A detailed history of service to the DSIs is included in Appendix C of the Draft Role EIS.)

At the present time BPA sells power directly to 15 industrial corporations with a total of 21 plants. Six plants are in Oregon, 13 are in Washington, and two are in Montana. Ten of the plants produce primary aluminum metal and account for approximately 90 percent of the direct-service industrial load. As of March 1, 1979, the DSIs had a contract demand of approximately 3400 MW of IF-1 power.

(2) *Power Sales Contracts.*

(a) *Industrial Firm Power.*

Industrial firm power (IF) agreements provide Bonneville with several different restriction rights which provide certain specified reserves. While each kilowatt of the DSI contract demand is subject to the different types of reserves provided by Bonneville's restriction rights, the IF agreements divide the DSI contract demand into quartiles for ease of administration. Each quartile has different conditions under which service can be interrupted to provide reserves to Bonneville.

> Top Quartile: At any time for any period for any reason. BPA will give as much notice as possible.

This quartile is served from secondary energy available only on an intermittent basis and is frequently interrupted. When prudent operation dictates the top quartile of the IF load be interrupted to ensure service to BPA firm loads, BPA will frequently make available Advance Energy. This energy is sold with the agreement the DSIs will return equal energy at a later time if BPA needs it to meet preference customer loads. This is done either through DSI energy purchases from other entities or through load interruption. If, under prevailing conditions, BPA cannot serve the top quartile with Federal power, it acts as a trust agent for the DSIs in the purchase of outside power and, when available, schedules the deliveries onto the power . . .

* * *

> **[IV-85]** Under the same conditions of system stability as identified under the second quartile, BPA can interrupt without notice:
>
> 1. All the load except that required for plant security for up to 5 minutes to maintain stability.
>
> 2. One-half the load for up to 2 hours in any day. Total restriction in kWh under this category

in any calendar year shall not exceed 50 multiplied by the Contract Demand.

Authorized Increase: This class of nonfirm power is provided for on some DSI contracts. It is not included in IF contract demands and is served under essentially the same conditions as the top quartile of IF power with the following exceptions; Authorized Increase will be restricted prior to restriction of top quartile of IF power, and Advance Energy will not be made available for Authorized Increase. The Authorized Increase contract section provides for an increase in industrial loads of 1 percent per year accumulatively, from July 1, 1978, through the term of the contract, of the industrial purchasers maximum demand for IF power. These increases in plant loads, for technological reasons other than plant expansion, are restricted to: improvement in the operation of the equipment installed in the purchasers plant, modification of such equipment, installation of additional auxiliary equipment, and installation of environmental protection equipment.

If any portion of the Authorized Increase is converted to IF power, it becomes subject to the restriction provisions of second quartile of IF power listed above.

In the event service to the DSIs is interrupted, the IF contracts contain a rate availability credit. This credit reduces the rate paid by the DSIs as power availability decreases. Basically, as the percentage of IF contract demand served by Bonneville decreases due to Bonneville's exercise of restriction rights, the rate paid by the DSIs for the power actually provided decreases. The availability credit does not apply if advance energy is provided.

(b) *Modified Firm Power.*

Modified firm power contracts (MF) differ from industrial firm power contracts in three areas: BPA's ability to restrict service, the rate availability credit, and advance energy.

The interruptibility arrangements under the modified firm power contracts are more limited than with the IF interim agreements. The top quartile (which is served with secondary energy) remains interruptible at any time for any reason. The remainder of the MF load can be restricted only:

> **[IV-86]** To the extent necessary to minimize restriction of firm power as a result of system stability problems or forced outages of Federal system facilities, including transmission facilities, Federal generating plants, or generating plants from which BPA acquires power. No notice is required. Total restriction for forced outages in kWh under this category in any calendar year shall not exceed 500 multiplied by the Contract Demand.

Additionally, MF contracts contain no provisions for rate credits when power is available less than 100 percent of the time.

Finally, the MF contracts contain no provisions for advance energy sales. Sale of advance energy under MF contracts energy would require new contracts to replace the provisional sale contracts which expired in 1974.

(3) *Impacts on the Power System*

(a) *Operations.*

Under the IF and MF contracts, the DSIs have a significant impact on operations of the regional power system. In addition to providing a market for reserves which is unique to the Northwest, their extremely high load factor allows BPA to more easily meet minimum river flows dur-

ing utility light load hours, to provide for interregional energy exchanges, and to more efficiently operate regional baseload thermal facilities. Finally, through advance energy sales, the DSIs allow for higher utilization of the river system's power capabilities.

Reserves—In the rest of the country energy and capacity reserves are provided by idle or excess generation of various types. This generation is utilized only occasionally. In addition, utilities plan to build resources ahead of need to allow for construction delays, etc. All of these reserves are costs to utilities and therefore to ratepayers. In the Pacific Northwest, reserves are provided by the use of restriction conditions in Bonneville's contracts with the DSIs, as well as by standby generation. These restriction conditions allow Bonneville to sell energy and capacity which otherwise would be idle to provide reserves, resulting in more efficient use of resources and adding revenues to the system. Without the restriction conditions the energy and capacity provided under the DSI contracts would be unavailable to the DSIs since Bonneville would have to hold such generation as reserves. The restriction conditions also allow the DSIs to adjust their operations to reflect market conditions for their products. Reserves provided by the DSIs include:

> *Operating Reserves:* In daily operations, BPA is required to maintain a minimum generation operation reserve to ensure reliability in the event generator or transmission outages jeopardize service to customers. The amount of operating reserve carried during each hour.

* * *

(Exhibit E to Preference Customer Memorandum,
filed Nov. 2, 1981)

Official Report of Proceedings

Before the
United States Department of Energy
Bonneville Power Administration
Portland, Oregon

Docket No.

In the Matter of:

Proposed Transmission Rate Adjustment
and
Proposed Wholesale Power Rate Adjustment

Place: Portland, Oregon

Date: April 4, 1981

Volume XII

Pages: 2002 - 2249

(By Mr. Wilcox) What's the complexity?

MS. MELTON: The complexity—one of the ones that we've identified among us up here is that you're assuming that the costs would be assigned directly to the DSI's and therefore we could say that there would be an additional cost. Any additional cost that Bonneville would have to incur would be spread over all its ratepayers; so what the net effect of all of that would be, we aren't able to say.

Q. No, I'm not asking how those costs are allocated. I'm simply asking, for total costs—not who pays those total costs—what would it cost? Would it cost more than $86 million to provide the DSI's with the same quality of power that all other loads in the region receive?

MS. MELTON: I think that that's probably true.

Q. Okay. Have the DSI's—has BPA ever interrupted any power deliveries to the DSI's?

MR. DEAN: Yes.

Q. Do you know the amount of BPA interruptions over the past five or ten years?

MR. WOOD: As far as clarification, your Honor, are we referring to interruptions—planned interruptions or forced outages? Are we referring to the firm loads or the interruptable loads? I'm not sure what the question is.

Q. (By Mr. Wilcox) Well, let's begin with the top quartile. Do you have any estimate of the amount and frequency and duration of interruptions of the top quartile over the past five to ten years?

MR. DEAN: Yes.

Q. Could you provide those?

MR. DEAN: Well, in anticipation of that question, I looked at the amount of—well, I've looked at the periods when BPA supplied direct non-firm service to the top quartile during the last five years.

Q. And what did that show?

MR. DEAN: Well, of course, direct service is provided from time to time and restricted from time to time. The response to the question would be a long list of details. I suppose to distill it to the least detail would be to say that in the five calendar years beginning January 1, 1976, BPA supplied direct non-firm service to the top quartile about 46 percent of the time. In addition, we supplied service by using advance energy about 21 percent of the time.

(Exhibit C to Preference Customer Memorandum, Filed Nov. 2, 1981)

Bernard Goldhammer Memorandum

Filed November 30, 1982

In the United States Court of Appeals
For the Ninth Circuit

No. 81-7561

[Case omitted in printing.]

United States Government
Memorandum

Date: November 1, 1974

In reply refer to: P

To: Donald Paul Hodel, Administrator—A

From: Bernard Goldhammer, Assistant Administrator for Power Management—P

Subject: Industrial Firm Power

For nearly three years we have been negotiating with our direct-service industrial customers new 20-year contracts with a lower grade of power than they now receive in order to provide BPA with additional reserves. To implement such lower grade of power, the Secretary of the Interior on August 15, 1974, filed with the Federal Power Commission an "Industrial Firm Power Rate," along with other proposed rate schedules and general rate schedule provisions. If the proposed schedules and provisions are approved by the Federal Power Commission, they would be effective December 20, 1974. We are proposing to make the new industrial contracts effective January 1, 1975, in order that BPA can secure the additional reserves at the earliest

possible date. Since the new 20-year industrial contracts will soon be presented for your review, I thought it desirable to review the background and the considerations for the new contracts.

Background

In 1969 Bonneville's participation in the Hydro-Thermal Power Program was approved by the National Administration. Bonneville and utilities in the region proceeded to implement the program with necessary contracts and the non-Federal utilities proceeded with construction or planned construction of large thermal generating units. The scheduling of these new power resources was designed to meet the requirements of all utilities in the West Group Area of the Northwest Power Pool and to provide modest increases for the large industrial customers served directly by BPA, as well as renewal of their power sales contracts.

We soon realized that a significant shortcoming of Phase 1 of the Hydro-Thermal Power Program was the lack of reserves for possible delays in initial operation of generating units and the possibility of operations of new resources below capacity for a period of time. This fear has been confirmed by the delays or less-than-full operation of the early thermal plants scheduled under the program. For example, the Trojan Nuclear Plant, from which Bonneville will obtain 30 percent of the output through net billing, was originally scheduled for commercial operation in 1974; it is now scheduled for late 1975 and operation could be delayed until 1976. The WPPSS No. 2 plant at Hanford was originally scheduled for commercial operation in 1977; it is now scheduled for 1978 with a high probability that it will be at least 1979 before the plant is in commercial operation. Bonneville will obtain 100 percent of the output from this plant. The Centralia coal-fired generating units started initial operations on schedule but the first three years of operation were below capacity as a result of in-

ability to meet air quality standards and difficulties in mining and handling coal. We still do not know if the Centralia generating units will be able to operate at capacity in their fourth year—the current year—of operation. The nuclear generating units under the program could similarly be limited as to their operation particularly in the initial period following commercial operation.

Industrial Sales

Soon after approval of the Hydro-Thermal Power Program in 1969, Bonneville, together with industrial customers and preference customers, started developing an "Industrial Sales Policy." With a small amount of power available for expansion of the large electroprocess loads and with three industrial contracts expiring in 1973, it was necessary to define under what terms and conditions additional power would be supplied to industry served by BPA, and the terms and conditions for renewal of industrial contracts. A policy was agreed upon and adopted by BPA on January 22, 1971. At that time the Federal Columbia River Power System was experiencing extensive slippages in the schedule of hydroelectric units. Reserves were not adequate to cover such slippage so it was agreed that the grade of power sold industry on renewal of contracts or for plant expansion would be a lower grade of power than the modified firm power then provided. Industrial contracts that have been renewed and additional power supplied industry under Phase 1 of the Hydro-Thermal Power Program contained contract terms which gave BPA the right to restrict deliveries. These rights to restrict deliveries are similar to those under "Industrial Firm Power."

The "Industrial Sales Policy" further provided that at least 25 percent of the Industrial Load would be served on an interruptible basis. It was also recognized and provided for in the "Industrial Sales Policy" that new 20-year contracts might be a condition for industrial customers to give

up existing contracts and take Industrial Firm Power in place of the higher grade Modified Firm Power.

Phase 2

Higher costs and longer lead times in construction of large thermal electric generating plants than were projected at the start of the Hydro-Thermal Power Program created difficulties in continuing the "net billing."

The final blow to "net billing" came in August 1972 when the U.S. Treasury Department issued regulations under the Industrial Revenue Bond Act of 1969 that provided that the Federal Government was no longer an exempt agency. This meant if BPA acquired more than 25 percent of the output of public systems' share of a thermal generating plant, the interest on the bonds the public system issued would not be exempt from Federal income taxes. This was not acceptable to publicly owned systems. These factors resulted in modifications of Phase 1 which is called Phase 2. Phase 2 envisaged new 20-year contracts for all industrial customers if they would take the lower grade Industrial Firm Power in place of Modified Firm Power and relinquish their rights under existing contracts so as to enable BPA to meet its firm commitments to existing preference customers. Phase 2 also projected that Bonneville would provide sufficient firm power for preference customers' load growth only through June 30, 1983. At that time there would be an allocation of firm energy to all preference customers served by BPA. Beginning July 1, 1983, preference customers would arrange for non-Federal resources to meet their load growth after that date.

Even if all resources under construction are available on their present schedule and operate at anticipated capacity, the Federal Columbia River Power System will experience a firm energy deficiency in each year 1977-78 through 1980-81. If there is a 1-year or 2-year delay in the resources,

then the situation becomes even more critical. Tables 1, 2, 3, and 4 show the regional and Federal Columbia River Power System's loads and resources on present schedules and with the assumption of 1-year and 2-year delays in the thermal plants, and then with a 1-year and 2-year delay in the thermal plants and a 1-year delay in the hydro installations.

Additional Resources

With the possibility that the Federal System will be unable to meet its contractual commitments under adverse hydro conditions and unable to meet the requirements of the Coordination Agreement to have sufficient load-carrying capability to serve all firm loads under adverse hydroelectric conditions, we attempted to secure additional resources. Since we recognized the large potential liability in case of breach of contract, we explored all avenues of potential power supply irrespective of cost.

One of the first avenues explored by Bonneville and the utilities in the area was the possibility of installing combustion turbines. After much discussion and analysis, two factors discouraged proceeding with such generating units: (1) the strong environmental objection in the area to this type of generation, and (2) the inability to assure a fuel supply.

BPA at the same time discussed with neighboring utilities in California, Montana, Idaho, and British Columbia the possibility of securing energy from such utilities during the late 1970's and early 1980's to make up the deficiency. No power could be guaranteed during that period by any of these utilities.

At our urging, the Centralia participants examined the possibility of a third unit at the coal-fired generating plant at Centralia. Bonneville was prepared to acquire one-third of the output of this proposed 700 megawatt unit, the in-

dustrial customers also were interested in acquiring one-third, which would serve as a reserve in case of delays in other generating plants, and the Centralia owners would take the remaining one-third. The very strong objections of the Southwestern Washington Pollution Control Authority because of the additional particulate matter that would be released in the atmosphere led the interested parties to the conclusion that Centralia Unit No. 3 was not at that time a viable project. Further examination was abandoned for the time being.

We concluded that the only way we could be assured of meeting our firm power commitments was to attempt to reduce BPA's firm power obligations during the period in which BPA's load-resource imbalance was most critical. This could best be accomplished by persuading our industrial customers to give up their existing rights to power in exchange for a lower grade of power than they now receive. We recognized this would require some trade-offs since existing industrial contracts run past the period in which we project the large deficiencies.

This would not be the first time that a trade-off was made with industrial customers to provide BPA with needed reserves. In 1965, BPA established "Modified Firm Power" for industrial use to provide the additional reserves needed for the thermal nuclear generating plant then under construction at Hanford, Washington. In turn for providing these reserves, industries paid less for modified firm power than for firm power.

Existing Industrial Contracts

BPA has contracted for nearly 3,000 megawatts of modified firm power to industrial customers and serves these customers about an additional 1,000 megawatts on an interruptible power basis. Table 5 lists BPA's industrial contracts. These contracts were all made in accordance with a commitment policy which assured preference customers

that BPA would meet their requirements for a reasonable period in the future. Commitments were made during World War II and the Korean War when industrial plants were needed to provide essential war materials. Most of these contracts were renewed with substantial expansion of facilities in the middle 1960's. The power in the 1960's was made available from the large gain in firm power in the United States as a result of the Treaty with Canada for Joint Development of the Columbia River. To make the Treaty economic so as to secure the flood control as well as the power benefits, the downstream benefits accruing to the United States had to be marketed when it became available. This meant selling part of such power for industrial expansion.

Industrial Firm Power

As part of our 1974 rate review we started early in 1972 discussing with our industrial customers rate schedules and general rate schedule provisions for a lower grade of power than they were receiving. We also recognized that as a result of plant delays, the grade of power would have to be a lower grade than we contemplated when we adopted our Industrial Sales Policy.

After numerous meetings with our industrial customers, we arrived at what we call Industrial Firm Power. This grade of power is quite different than power sold by any other utility, any place. Each kilowatt of Industrial Firm Power has the following characteristics:

(1) One-fourth of the contract demand can be restricted by BPA at any time.

(2) One-fourth of the contract demand can be restricted by BPA for the following reasons:

(a) forced outages on the Federal System or on systems from which the Federal System secures power. Such restriction can take place only to the

extent that Bonneville is unable to meet its firm power commitments as a result of such forced outages. The amount of restriction expressed in kilowatt-hours is limited to 375 times the contract demand for any calendar year;

(b) delays in generation schedules or inability to operate a unit at capacity on the Federal System or on systems from which the Federal System secures power when, as a result of such delays or inability to operate at capacity, Bonneville cannot meet its firm obligations including Industrial Firm Power; and

(c) transmission outages.

(3) One-fourth of the contract demand may be restricted to provide a regional reserve for delays in non-Federal generation units or inability to operate such units at capacity, but only to the extent that each industry is first given the opportunity to participate in reserve generating units or plants and elected not to do so. It is to be noted that the credit of the industrial customers is necessary to finance such reserve generating facilities. It is expected that most of the industrial customers taking Industrial Firm Power will elect to take their share of the output from the reserve plants (about 1,000 megawatts) and pay the cost of such power. This power, when delivered, will replace up to one-fourth the industrial load. However, if a generating unit (other than the reserve plant) is delayed or expected to operate at less than rated capacity, the utilities participating in it may withdraw reserve plant power from industry. If a particular industrial customer taking Industrial Firm Power elects not to participate in a reserve plant, such customer's contract demand can be restricted as stated above.

(4) BPA can restrict one-half of each industrial customer's load then operating for 2 hours in any day

if BPA cannot meet its firm obligations, including Industrial Firm Power. The total limitation expressed in kilowatt-hours under this provision for any one year is 50 times the contract demand.

(5) Bonneville can restrict the entire industrial load, except an amount necessary for security purposes (such as providing energy for pumps for fire protection), for 5 minutes to provide system stability and reliability.

Results

Our analysis indicates that this lower grade of power will enable us to squeeze by the late 1970's and early 1980's even with a 1-year delay in scheduled resources. We still face minor deficiencies with possible 2-year delays in scheduled resources. With longer delays we face serious problems. Although the major need for additional reserves is in the late 1970's and early 1980's, the lower grade of power to industry will provide a desirable reserve for the Federal Columbia River Power System for the 20-year duration of proposed new contracts.

Industries' Situation

During the term of industrial contracts (most of which expire in the middle 1980's), Bonneville has no authority to reduce the grade of power to the industries without their concurrence. To encourage industries to give up their existing power sales contracts and to take the lower grade of power, I propose that Bonneville offer the industrial customers new contracts for such power with a 20-year term from January 1, 1975, through December 31, 1994. These new contracts must provide some advantages to industry in order for them to give up their existing contracts. The significant advantage to industry is that the new contracts would enable industry to obtain Bonneville power for 20 years through 1994. We have informed the

industries that it is unlikely that the new contracts would be extended beyond 1994 except for interruptible power. Hence industry will then need new power sources if it is to continue to operate in the region.

If an industry chooses not to take the new contract with the lower grade of power, it can continue with its present contract but its contract probably cannot be renewed when it expires.

Industrial Firm Power Rate

We have designed the Industrial Firm Power Rate Schedule to go with new contracts. Under this rate schedule, charges will vary in accordance with the annual availability of power. If availability is 100 percent for the year, industries will pay the same rate as utilities do for firm power, but there is a sliding scale reduction in charges if Industrial Firm Power availability is less 'han 100 percent. This proposed rate schedule along with other proposed rates was filed by the Secretary of the Interior with the Federal Power Commission on August 15, 1974. This power rate based on availability is another consideration to induce industrial customers to terminate existing contracts and accept new contracts with the lower grade of power.

BPA's Advantage

As indicated above the proposed new 20-year industrial contracts with Industrial Firm Power is BPA's only viable alternative for securing needed reserves for new power resources. Without such reserves, BPA may by necessity have to breach contracts in the late 1970's or early 1980's. The cost to BPA of such contract breach could be substantial amounting to several millions of dollars for each breach. In addition, the cost to the region of an unreliable power supply is beyond estimate. In the long run, the lower grade of power to industry will be a better use of resources and less expensive to the Federal Columbia River Power System than if additional reserves were acquired through

construction of additional facilities or purchase of power from other utilities. The investment capital required for new resources or cost of purchased reserves is saved. With a lower grade of power to industry, the reserves are used for productive purposes and are not idle until needed to meet firm loads. Only industries like aluminum reduction, ferroralloys, and some chemicals can utilize this lower grade of power. Utilities cannot use this lower grade of power to serve residential, farm, commercial, and the usual (other than electroprocess) industrial loads.

In addition to the Federal Columbia River Power System saving the cost of new resources, additional revenue is received as a result of sale of power to industry that, in part, would be unsalable. Bonneville revenues from these industrial customers will total about $2.5 billion over the 20-year term of the new contracts. If Bonneville did not serve the industrial loads under the new contracts, a substantial portion of the energy used by the industrial customers could be sold in other regions such as California and some in the Pacific Northwest region to replace generation utilizing fuel. However, such markets are not large enough to absorb the amount of energy available under all water conditions and more water would spill over the dams instead of generating valuable electric energy. We estimate that if just one-fourth of the industrial contract demand were not sold to industry in 1975-76, based on 94 years of water conditions, an average of 266,000 kilowatts would be wasted. With service to industry this energy will be used for production purposes and Bonneville will secure revenues from its sale.

The proposal will have additional advantages as follows:

(1) The effect of obtaining reserves from industrial customers will enable BPA to charge lower rates than if equivalent reserves were provided by the usual procedure of idle resources until needed. BPA will secure revenue from the sale of such reserves to industry except when the reserves are needed for BPA to meet its other commitments.

(2) The enhanced utilization of existing resources reflects a conservation of energy resources and of capital which cannot go unnoticed under present and projected energy deficiencies and scarcity of capital. For example, the construction of a 1,000 megawatt generating unit in the early 1980's will require about $1 billion.

(3) The proposed industrial contracts will enable BPA to maintain adequate operating reserves with a minimum of idle resources. The proposed Industrial Firm Power will enable BPA to a much greater extent call upon this power to meet unanticipated generation or transmission outages or swings on the Federal System as a result of disturbances on neighboring systems. Without the Industrial Firm Power, it would be incumbent upon BPA to reserve resources in a nonproduction status to meet such contingencies so that a reliable source of power could be supplied to BPA's preference customers.

The melding of BPA's need for adequate reserves to assure continued reliable service to its firm power customers with the unique ability of industrial customers to utilize a grade of power which anticipates interruption, presents BPA with an opportunity to provide the needed reserves while, at the same time, assuring a market for resources which might otherwise be wasted.

(4) New 20-year contracts will assure operation of these basic industries in the region at least through 1994. This is of considerable importance to the economy of the region.

Conclusion

The above advantages of replacing existing industrial contracts with the lower grade Industrial Firm Power can only be achieved by new 20-year contracts. The extension

of the term of the contract is the primary advantage to industries in giving up their existing contracts. The major advantage to BPA is to enable it to meet its commitments for a firm power supply to existing preference customers and thereby substantially reducing the probability of having to breach any contracts. Our preference customers will receive the advantage of a more reliable power supply from BPA at lower cost than the continuation of existing industrial contracts with Modified Firm Power. Also, the national economy will secure a better use of energy resources.

To achieve these advantages, I recommend new 20-year contracts with our industrial customers. We will review drafts of contracts with you shortly.

/s/ Bernard Goldhammer

SECOND AFFIDAVIT OF GERALD R. GARMAN

[Filed November 23, 1981]

In the United States Court of Appeals
For the Ninth Circuit

No. 81-7561

[Case omitted in printing.]

State of Oregon }
County of Multnomah } ss.

I, Gerald R. Garman, being first duly sworn on oath, depose and say that:

My qualifications and involvement in the Regional Power Act are set forth in my affidavit of August 31, 1981 which is Exhibit B to our Motion for Temporary Relief.

OPERATE AS IF FIRM

In its brief, BPA claims that "operate as if firm" requires them to change their priority for the sale of nonfirm energy to serve the interruptible first quartile of the industrial purchaser load prior to preference customers. This term refers to Bonneville's attempt to shift water under the Pacific Northwest Coordination Agreement. It has no meaning in the context of the priority for sale of nonfirm energy.

BPA MISDEFINES RESERVES

On p. 32 of its brief, BPA states: "Each of these petitioners must declare an assured energy capability for its resources to the extent its resources fail to deliver the declared assured energy capability, the petitioner, as a member of the Pacific Northwest Power Pool, is obligated by agreement to have reserves to provide the backup for its

own resources. (Section 2 of the Northwest Power Pool Coordinated Operation Principles and Procedures.)"

BPA should have quoted Section 2 which states: "Each system shall maintain sufficient capacity at all times to provide for changes in load that may be expected to occur under normal operating conditions. In addition, each system shall maintain an Operating Reserve equivalent to the sum of 5 percent of the total hydro generation and 7 percent of the total thermal generation being produced and utilized by a system. . . .". These reserves listed above are *all capacity reserves as defined in this same section.* They are *not energy reserves as BPA incorrectly stated in its brief.* This section highlights the preference customers' need for nonfirm energy to protect the firm energy resources.

BENEFIT OF NONFIRM ENERGY

Contrary to assertions by BPA and the industrial purchasers, BPA will not lose revenue if preference customers have first priority to nonfirm energy; rather, this priority increases revenues.

Under BPA's IP-1 rate to industrial purchasers, the net energy cost is 5.1 mils per KWH in the winter and 4.6 mils in the summer. Under BPA's NF-1 rate for nonfirm energy to preference customers, the minimum rate is 6.5 mils per KWH during the heavy load hours and 5.0 mils during the light load hours for solely hydro-generated nonfirm energy. These minimum rates apply only when hydro-generated energy is available, but will range as high as 17 mils per KWH when it is not. This 17 mill figure should increase dramatically in the future as thermal increases not only in price but in quantity on the BPA system. Thus, BPA will

secure less revenue from IP-1 sales of nonfirm energy to the first quartile of industrial purchasers than it would from the NF-1 rate for sale of nonfirm energy to preference customers.

/s/ GERALD R. GARMAN

Subscribed and sworn to before me this 20th day of November, 1981.

/s/ TARECIA M. CLINE
Notary Public for Oregon
My commission expires: 6-22-85

United States Court of Appeals
For the Ninth Circuit

No. 81-7561

[Case omitted in printing.]

OPINION

[Filed April 6, 1982]

Argued and Submitted January 6, 1982.

Decided April 6, 1982

Before: BROWNING, Chief Judge, and WALLACE and BOOCHEVER, Circuit Judges.

This case concerns the allocation of power under the newly enacted Pacific Northwest Electric Power Planning and Conservation Act, Pub.L. No. 96-501, 94 Stat. 2697 (1980) (the Act). Public utility customers of the Bonneville Power Administration (BPA) contend that the power contracts offered to BPA's industrial customers violate those provisions of the Act that give preference to public utilities in the allocation of power. Because we find no explicit exception to the unambiguous provisions of the Act that preserve the longstanding preference given to public utilities, we find the contracts invalid.

FACTS

BPA is the federal agency that markets federal hydroelectric power in the Pacific Northwest. Congress passed the Act to resolve competing claims to low-cost federal power. *See, e.g.,* H.R. Rep. No. 976 (Part II), 96th Cong. 2d Sess. 26 (1980). The Act requires BPA to offer long-term contracts to all of its customers. BPA offered contracts to its direct service industrial customers (DSIs) on August 28, 1981. These contracts are the first to be offered under the Act and the first to be adjudicated.

BPA provides DSIs "Industrial Firm Power" which allows BPA to restrict its delivery of power to the DSIs for specified reasons. Each quartile, or fourth, of the DSI power is subject to different restrictions. The first quartile is served partially with nonfirm energy, the energy remaining after BPA has fulfilled its firm obligations. Nonfirm energy is the energy in excess of that which BPA can reliably plan on producing and is therefore provided only when such an excess exists.[1] Firm energy is the energy that BPA can reliably plan on producing and must be sufficient to serve BPA's firm loads. Firm loads are the power requirements that BPA must plan for and may not restrict.

Prior to the Act, BPA offered nonfirm energy first to the preference customers and then to the DSIs. Under the new contracts, BPA plans to offer nonfirm energy to the DSIs first. The preference customers challenge the contract provisions that effectuate this new method of allocation.[2]

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[1]BPA plans its future power resources on the assumption that during some periods the water levels used to generate power will be low or "critical." BPA plans on having at least the amount of power that it can produce at a critical water level and that power is therefore firm power. When the water level is greater than critical, the power generated from the excess water is nonfirm energy.

[2]Four provisions in the contracts effectuate this interpretation. Section 7(c) provides that sales will be made to the first quartile prior to other sales of nonfirm energy. Section 7(e) provides that the adjustments for energy already used by the first quartile may not be made for sales of nonfirm energy to preference customers. Section 8(a)(2) provides that BPA will not sell nonfirm energy if it can be used for the first quartile. Section 8(c)(9) provides that BPA will attempt to acquire additional energy before requiring DSIs to repay energy advanced to the first quartile.

ANALYSIS

I.

Applicable Standards

Section 9(e)(5) of the Act provides that suits to challenge final actions such as contract offers shall be brought in the United States Court of Appeals for the region. The original jurisdiction given this court by § 9(e)(5) raises procedural problems that will have to be resolved on a case-by-case basis. Because no factfinding is necessary in this case, we will treat it like a petition for administrative review. A myriad of variations may arise in suits brought under the Act, and we do not intend to bind the court to the procedures used in this case.

Section 9(e)(2) of the Act provides that the scope of review by this court of a sale of electric power is governed by the Administrative Procedure Act, 5 U.S.C. § 706. The Administrative Procedure Act specifies that in reviewing agency actions, a court shall decide all relevant questions of law, interpret statutory provisions, and determine the applicability of the statutory terms to agency action. The reviewing court must set aside agency actions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id.* § 706(2)(A).

In interpreting the Act, we give substantial deference to BPA's construction of the statute because BPA is the agency charged with the Act's administration. *United States v. Rutherford,* 442 U.S. 544, 553 (1979). This deference is especially appropriate because BPA's interpretation is a contemporaneous construction of a statute by those with the responsibility for setting it in motion. *Udall v. Tallman,* 380 U.S. 1, 16 (1965); *Columbia Basin Land Protection Association v. Schlesinger,* 643 F.2d 585, 600 (9th Cir. 1981). Additional weight is given the agency interpretation when the agency administrators participated in drafting the legislation as they did here. *Zuber v. Allen,* 396 U.S. 168, 192

(1969). Our review is limited to whether BPA's interpretation of the Act is reasonable. *Columbia Basin*, 643 F.2d at 600. Only if BPA's interpretation is unreasonable may we conclude that BPA's contract offers violate the Act.

II.

The Preference

Giving all due deference to BPA's construction of the Act, we nevertheless find its interpretation unreasonable. We find that the explicit and longstanding preference retained in the Act controls rather than the ambiguous provisions relied upon by BPA to justify a change. Before examining the Act's legislative history and underlying purposes, we turn first to the express terms of the Act.

A. Pertinent statutory provisions

1. Preference provisions: Section 5(a) of the Act provides that:

> All power sales under this Act shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937. . . .

At § 10(c), the Act further provides that:

> Nothing in this Act shall alter, diminish, abridge, or otherwise affect the provisions of other Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power.

The Bonneville Project Act, 16 U.S.C. §§ 832 *et seq.*, requires that BPA give preference and priority to public bodies and cooperatives in selling power. 16 U.S.C. § 832(c)(a). Thus, §§ 5(a) and 10(c) of the Act explicitly reaffirm the preference to public bodies established by the Bonneville Project Act.

Preference provisions have been included in federal power acts since 1906. Fereday, *The Meaning of the Preference Clause in Hydroelectric Power Allocation under the Federal Reclamation Statutes*, 9 Envt'l L. 601, 610 (1979). BPA's allocation of power has been subject to the preference since the Bonneville Project Act was passed in 1937. It is undisputed in this case that BPA previously interpreted the preference provision to apply to nonfirm power as well as firm power. Thus, prior to offering the contracts now at issue, BPA allocated nonfirm power according to the preference after it had first allocated firm power according to the preference. BPA's pre-Act interpretation of the preference was consistent with this court's interpretation of a preference clause under an analogous statute. *See Arizona Power Pooling Association v. Morton*, 527 F.2d 721, 725 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976) (holding that a similar preference clause in the Reclamation Project Act of 1939, 43 U.S.C. § 485(h)(c), applied to sales of thermally generated electrical power).

Any modification of the preference, in view of its long history and clear reaffirmation in the Act, should be explicit. *See generally New England Power Co. v. New Hampshire*, ... U.S. ......, 50 U.S.L.W. 4223, 4227 (February 24, 1982) (courts "have no authority to rewrite . . . legislation based on mere speculation as to what Congress 'probably had in mind' ").

2. Basis for BPA's interpretation: BPA's interpretation is based on the assumption that § 5(d)(1)(A) of the Act requires giving the DSIs priority to nonfirm energy for their first quartile. Subsection 5(d)(1)(A) provides that:

> The Administrator is authorized to sell in accordance with this subsection electric power to existing direct service industrial customers. *Such sales shall provide a portion of the Administrator's reserves for firm power loads within the region.* (emphasis added).

Section 3(17) of the Act defines "reserves" as the power needed to avert shortages for the benefit of firm power customers.[3] To evaluate the BPA's conclusion, it is first necessary to consider the manner in which nonfirm energy is initially allocated.

The sale of nonfirm energy is contingent on availability. When sufficient nonfirm power is available, BPA provides it as needed to both the preference customers and DSIs. When, however, there is insufficient nonfirm energy to fill the needs of both types of users, the preference clause appears on its face to mandate, and, as previously interpreted by the BPA, did require, that the nonfirm energy needs of the preference customers be met before the nonfirm needs of the DSIs. Application of the preference in this manner interrupts the flow of nonfirm power to the DSIs. BPA and the DSIs argue that this process violates § 5(d)(1)(A) because it makes the DSI's nonfirm power a reserve for the preference customers' nonfirm needs.

The BPA and DSIs' reasoning is flawed. Although applying the preference may deprive the DSIs of nonfirm power, that does not constitute using reserves for nonfirm loads. This so-called interruption results from insufficient energy to make the initial allocation of nonfirm power to the DSIs, not from the use of energy already allocated to the reserve. It is meaningless to speak of interrupting the flow of power that has not yet been allocated. No customer has an expection of receiving any nonfirm power until BPA allocates it. The power allocated to the DSIs' first quartile serves as a reserve for firm loads because it may be interrupted on a few moments notice if, for example, the demand

[3]BPA contracts to provide the DSIs with power. If, however, a power plant outage occurs or energy use peaks, for example, so that BPA could not meet its firm obligations, BPA would interrupt its service to the DSIs and use the power then available to serve its other loads. In this way, the power allocated to the DSIs serves as a reserve.

for firm power peaks. *See* note 3, *supra*. It is a non sequitur to conclude from the fact that the reserve cannot be used for nonfirm needs that the nonfirm energy cannot initially be allocated to the preference customers in accordance with the preference.

The only reasonable interpretation of § 5(d)(1)(A) that is consistent with the preference is that the initial allocation of nonfirm power is no less subject to the preference than firm power. Nonfirm power does not become part of the reserve in the DSI load unless there is nonfirm power in excess of the amounts needed by the preference customers. When there is no surplus over the amount needed by the preference customers there can be no provision to the DSIs and, thus, no reserve created. When, however, there is sufficient energy to provide nonfirm power to both the preference customers and DSIs, the nonfirm power allocated to the DSIs becomes a reserve for firm loads. If, for example, a preference customer's firm load peaked above BPA's firm power resources so that BPA's obligation exceeded its ability to furnish firm power, BPA would meet the peak demands with energy from DSIs' reserves. This straight-forward construction is preferable because it harmonizes what would otherwise be conflicting provisions of the Act. *See generally Erlenbaugh v. United States*, 409 U.S. 239, 244, 45 (1972); *Clark v. Ubersee Finanz-Korp.*, 332 U.S. 480, 488-89 (1947).

Moreover, even if § 5(d)(1)(A) could be construed as creating an exception to the preference, BPA's interpretation is unreasonable given the clear preference provisions to the contrary. Section 5(d)(1)(A) specifies only that the reserve shall be used for firm power loads; it says nothing about the provision of nonfirm energy. To accept BPA's interpretation, we would have to infer that the interruption of the DSI nonfirm power that would result from the application of the preference when there is insufficient

power for all users is equivalent to using reserves for nonfirm loads. We would also have to infer that any allocation of nonfirm power that might interrupt the flow of nonfirm power to the DSIs is not subject to the preference. It is unreasonable to assume that Congress intended to create such a significant exception to the preference through the indirect device of a provision referring to reserves.[4] We discern no basis in the explicit preference provisions of the Act for differentiating between the preference accorded nonfirm and firm power. We believe that if Congress had intended to override its twice-expressed and explicit preference mandate it would have spoken more directly.

Although the language of the Act appears clear, and thus controlling, we briefly examine the Act's history and

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[4]BPA and the DSIs argue that BPA informed Congress of its proposed interpretation of the Act while the Act was still pending and that, in passing the legislation, Congress accepted BPA's interpretation. We rejected a similar argument in *Arizona Power Pooling, supra,* where the agency authorized to allocate federal power argued that Congress had indirectly "approved" an exception to the preference through actions it had taken in regard to annual appropriations for the project at issue in that case. Although it was undisputed that Congress had taken certain actions in passing appropriations that supported the agency's decision not to sell interim power to a preference customer, this court concluded that:

> [t]his fact in and of itself does not justify the inference of congressional approval of purchase negotiations that were allegedly conducted in violation of the preference clause.

527 F.2d at 726. The court went on to note that nothing in the record or legislative history indicated that Congress was aware that its actions on appropriations would be construed to affect preference rights. *Id.*

Similarly, in the present case, there is no more indication that Congress was aware that BPA's interpretation would create an exception to the preference than there is that Congress intended to create such an exception through the indirect device of the reserve provision. Precise knowledge of the agency position is necessary to a finding that Congress ratified it. *Id.*

purpose to see if they are consistent with what appears, on the Act's face, to be Congress' clear intent.

B. Legislative History

The legislative history does not provide clear support for either side. Thus, although the preference to public utilities is explicitly recognized,[5] we acknowledge that there are also statements supporting BPA's interpretation.[6] It is unfortunate that the legislative history fails to give a clearer indication of Congressional intent. The inconsistent

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[5]The House Committee of Interior and Insular Affairs stated in its Report "it is not, however, a purpose to interfere in any way with, or modify the statutory rights of preference customers either within or without the region." H.R. Rep. No. 976 (Part II), *supra*, at 26. *See also Id.* at 34. The House Committee on Interstate and Foreign Commerce responded in its report to concerns that the Act would change the meaning or applications of the preference. It stated that it did not want to undo nearly 80 years of history and that specific provisions were designed to protect the entitlement of preference customers to the full Federal base system. H.R. Rep. No. 976 (Part I), *supra*, at 26.

[6]Support for BPA's position can be found in Part II of the Report. It states that:

> Approximately 25 percent of the DSI load is to be treated as a firm load for purposes of resource operation . . .

H.R. Rep. No. 976 (Part II), *supra*, at 48. The quartile referred to is the first quartile. Appendix B to the Senate Report provides that the first quartile:

> would be served with resources which are in excess of critical planning amounts but operated to meet the entire DSI load as if it were firm.

S.Rep. No. 272, 96th Cong. 2d Sess. 59 (1980). The following sentence in the appendix to the Senate Report, however, indicates the ambiguity in Congress' direction to treat the first quartile as firm. It provides:

> The operation of the System to carry out this purpose results from treating as a firm load the maximum amount of the DSI load (not all of which can be covered under critical streamflow planning), to the extent that this maximum load can be met in the initial period of the PNW Coordination

character of the legislative history is reflected several places in the Act, leading inevitably to burdensome resort to the courts for interpretation.

C. Purpose of the Act

Congress intended to achieve several purposes in the Act. It primarily intended to determine how federal power should be allocated and to give BPA authority to acquire power resources. *See, e.g.,* H.R. Rep. No. 976 (Part I), *supra,* at 27. In its allocation of power, Congress clearly manifested its intention to retain the preference clause. *Id.* The purpose of the preference is to give public bodies the benefit of public power, and to provide low-cost power to the greatest number of consumers. Fereday, *supra,* at 604, 632-33. Congress also intended to provide low-cost power to residential consumers of private utilities. H.R. Rep. No. 976 (Part II), *supra,* at 34-35.

To effectuate these purposes, the Act contemplates that the DSIs will pay rates sufficiently high to cover BPA's

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> Agreement Critical Period while protecting firm loads against the worst historical streamflow and maintaining an ability to restrict an equivalent amount of the DSI loads in the later periods (without provisional or advance energy being made available for this amount of the DSI load).

Id. The above-quoted sentence refers to a plan called Firm Energy Load Carrying Capability by which BPA borrows power from future years on the probability that there will be greater than critical water levels. The sentence indicates that treating the DSI load as firm means using only this plan to meet the DSIs needs. This is particularly evident in the provision that BPA need not supply the amount of power borrowed from future years if the water levels are low.

The reference to "treating the DSI load as firm in the operation" is ambiguous because the first quartile cannot be treated as firm entirely. Unlike firm power, it is interruptible and subject to priorities. If the first quartile does not have all the attributes of firm power in the context of operations, the phrase "treat as firm" does not indicate what firm attributes the first quartile has.

cost of acquiring new resources and to subsidize the sale of low-cost power to residential customers of private utilities. The DSIs argue that the assurance of power to their first quartile was a necessary inducement for them to enter the contracts requiring them to pay significantly higher rates. We disagree. Congress provided an ample incentive for the DSIs to enter the new contracts. Many of the DSIs' prior contracts would have expired soon after the Act was passed and those DSIs would have had to pay higher rates for whatever replacement power they could find after the expiration of their contracts. H.R. Rep. No. 976 (Part I), *supra*, at 28. The primary incentive for the DSIs to enter the contracts was the longterm security they gained from the new twenty-year contracts.[7]

Although there is no case authority directly on point, *City of Santa Clara, California v. Andrus*, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978) is instructive on the purposes and proper interpretation of a preference clause. In *Santa Clara*, the Secretary of the Interior, acting through the Bureau of Reclamation, "banked" power produced pursuant to the Reclamation Project Act of 1939 (43 U.S.C. §§ 375a, 387-89, 485 *et seq.*) with a non-preference customer instead of selling it directly to a preference customer. The Secretary argued that the arrangement was designed to enable him to supply the future needs of

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[7]Although we ultimately hold for the preference customers, we note that we do not find persuasive their argument that BPA's interpretation is unreasonable because it provides a disincentive for them to build new power facilities. The incentives that Congress provided preference customers for constructing power facilities are that: (1) they can receive credit on their current power bill for the cost of constructing facilities that reduce BPA's obligation to acquire resources (Act at § 6(h)); or (2) they can sell the capacity to BPA at a reasonable price while paying low federal rates for power (Act at §§ 6(a)(2), 6(i)(2), 7(b)(1)). Congress, the body authorized to do so, provided ample incentives, irrespective of the preference clause's application to nonfirm power.

selected preference customers. 572 F.2d at 669. This court held that the provisional sale of power to a non-preference customer when a preference customer is ready and willing to buy it contravened the purpose of the preference because the non-preference customer would profit from low-cost power at the expense of the preference customer. *Id.* at 670-71. Although the court recognized that the ultimate goal of the Secretary's scheme was consonant with the preference clause, it nevertheless found that the interim effect was inconsistent with the preference clause, and, therefore, held the scheme invalid.

The contention in the present case that the sale of nonfirm energy to DSIs serves the preference clause by creating reserves and earning revenue that can reduce the rates of all preference customers is answered by *Santa Clara.* BPA's policy may serve the preference clause, but the immediate effect, like that in *Santa Clara*, is antithetical to preference rights, and, therefore, is not consonant with the preference clause.[8] The fact that BPA's policy may enable it to profit more from selling the nonfirm energy to the DSIs and that all of its customers would thereby benefit does not persuade us that its interpretation

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[8]BPA's reliance on *Volunteer Electric Cooperative v. Tennessee Valley Authority*, 139 F.Supp. 22 (E.D. Tenn. 1954), *aff'd mem.*, 231 F.2d 446 (6th Cir. 1956) is misplaced. In *Volunteer*, TVA sold directly to an industrial customer instead of allowing its preference customer to serve the industry and gain the profit. The court held that TVA could serve the industry directly because the benefit would be shared by all customers, not just the one utility, and that that approach served the Act's purpose to provide low-cost power. The present case is not one in which a preference customer profits from selling power acquired through the preference to the industries who also want the power. Here, the preference customers want the low-cost power for their customers. To the extent that *Volunteer* holds that the power agency may bypass the preference if the bypass benefits all of its customers, *Volunteer* is contradicted by *Santa Clara*.

is reasonable. As explained in *Santa Clara*, the purposes of the Act and its preference clause are best served by an interpretation that ensures the sale of power to preference customers. BPA's interpretation to the contrary, without explicit Congressional direction, contravenes the purposes of the preference clause.

CONCLUSION

Congress strongly reaffirmed in the Act the longstanding preference given to public bodies in the sale of federal power. The Act contains no explicit direction from Congress to create an exception to the preference with respect to the provision of nonfirm power to DSIs. We hold that BPA's interpretation is unreasonable because it contravenes the longstanding preference explicitly continued under the Act and is without express statutory support.[9] Accordingly, we remand the matter to BPA with directions for further action consistent with this opinion.

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[9]Because we find that the priority given the DSIs for nonfirm power violates the preference provisions of the Act, we do not reach two remaining issues. We need not determine whether the new contracts violate § 5(d)(1)(B) by providing the DSIs more power than they were entitled to under their 1975 contracts. Similarly, whether BPA failed to follow required procedures in adopting its interpretation of the Act is moot in light of our holding that the interpretation is unreasonable.

United States Court of Appeals
For the Ninth Circuit

No. 81-7561

[Case omitted in printing.]

[Filed Sept. 7, 1982]

ORDER

The panel in the above-entitled case has agreed to amend the Opinion as follows:

1. Insert new footnote at page 6, line 32, stating:

4. We find no support for the contention that § 5(d)(1)(B) guarantees the nonfirm power needed to serve the DSIs' first quartile. Section 5(d)(1)(B) expressly links the DSIs' present allocation to their entitlement under the 1975 contracts. It is undisputed that under the 1975 contracts the DSIs received nonfirm power only after the preference customers filled their nonfirm needs. Thus, subsection (B) does not entitle the DSIs to nonfirm power for the first quartile under the contracts now at issue. Moreover, § 5(g)(7) does not alter this conclusion because it does not grant the DSIs any greater entitlement than what they received under the 1975 contracts.

2. Renumber all subsequent footnotes and signals.

3. Change footnote 10 (old footnote 9) to read:

10. Because we find that the priority given the DSIs for nonfirm power violates the preference provisions of the Act, we need not determine whether BPA failed to follow required procedures in adopting its interpretation of the Act.

United States Court of Appeals
For the Ninth Circuit

No. 81-7561

[Case omitted in printing.]

[Filed Sept. 27, 1982]

ORDER

Before: Browning, Wallace and Boochever, Circuit Judges:

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R. App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Schedule of Events

Leading to the Offering of Contracts

(5/81 - 6/25/81)

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1981

Department of Energy

Bonneville Power Administration

[1475]

Department of Energy
Bonneville Power Administration
Notice of
Draft Prototype Power Sales Contracts
Interpreting Policy Provisions
of Pacific Northwest Electric
Power Planning and Conservation Act:
Publication of Summary of
BPA's Proposed Contract Provisions
and Request for Public Comment

* * *

[1490]

III. *Discussion of Contract Elements—DSI Contracts.*

A. *Duration of Contract and Related Matters.*

1. *Term.* All contracts will be effective on the date agreed upon among the parties and will terminate approximately 20 years later on June 30, 2001, consistent with legislative history and BPA's interpretation of the language of Public Law 96-501 referring to "long-term" contracts. BPA has proposed the 20-year term for these power sales contracts, as it has historically, based on the longest term permitted under the Bonneville Project Act of 1937. This affords BPA the greatest opportunity to engage in prudent long-term planning. Some public comment has suggested that the 20-year term could delay implementation of alternative power sales policies.

2. *Effective Date.* Proposed by BPA to be July 1, 1981, but may not be later than October 1, 1981.

3. *Status of Existing Contracts.* BPA proposes termination of existing contracts. The DSIs prefer that existing contracts not be terminated, but that deliveries be made pursuant to the terms of the new contracts.

4. *Existing Liabilities.* Any liabilities under current power sales and operating agreements will be preserved until satisfied.

5. *Follow-on Contracts.* BPA will not be obligated to offer a follow-on contract. However, BPA and DSIs would establish a mechanism for assessing mutual desire and ability to execute such contracts. Further, DSIs prefer that BPA acknowledge an obligation to achieve and maintain load/resource balance throughout the contract term. BPA acknowledges its statutory obligations to acquire sufficient resources to meet its contractual obligations.

[1491]

B. *Class of Power.* The contract would be for a unified class of Industrial Firm Power (IF) and for amounts of Auxiliary Power, subject to restriction by BPA and curtailment by the customer on the terms and conditions set forth in the contract.

C. *Amount of Power.*

1. *Generally.*

a. The Regional Act entitles each DSI to the amount of power to which it is presently entitled under the IF contracts, including technological improvement allowances for purposes other than plant expansion.

b. The new DSI contracts will contain demand levels known as "Contract Demand" and "Operating Demand;" a contract demand for Auxiliary Power will also be included. The Contract Demand and Operating Demand may be identical for some companies. Contract Demand would represent the maximum amount of power each DSI is entitled to receive from BPA under the new contract. Operating Demand would represent each company's operating level actually achieved or in the process of being attained. Adequate notice would be required for increases or decreases in operating levels that result in operating levels less than or equal to Operating Demand. Notice for certain increases in Operating Demand would be iden-

tical to notice provisions of utility contracts (amount of notice is a function of the size of increase). Technological Improvement Allowances (TIA), if granted, would increase both Contract Demand and Operating Demand by the amount of the TIA.

2. *Contract Demand.*

a. Each DSI contract would contain a specified Contract Demand level.

b. Contract Demand for each DSI will be the sum of:

(1) Contract demand in the current IF contract;

(2) Authorized Increases granted in the past and incorporated or scheduled to be incorporated in the current IF contract;

(3) Additional Power actually purchased under current contracts; and

(4) Technological Improvement Allowances that are granted (see Section 4 below).

3. *Operating Demand.*

a. Each DSI contract would contain a specified initial Operating Demand level and scheduled increases thereof, reflecting the company's recent operating experience, announced plans, and current plant capability.

b. Generally, matters such as billings, restriction amounts and allocations of Advance Energy and IRE (see below) would be based on Operating Demand rather than Contract Demand.

c. No notice is required for increases in Operating Demand specified in the Contract. Each DSI may otherwise increase its Operating Demand up to the limit of its Contract Demand upon appropriate notice.

4. *Technological Improvement Allowances (TIA's).*

a. *Availability.* As in existing contracts, TIA are for purposes other than plant expansion.

b. *Amount.* The total TIA pool is limited to one percent per year of the total initial Contract Demand, cumulated and carried forward to the extent not used from July 1, 1978.

[1492]

c. *Eligibility.* Technological Improvements that (i) meet the contractual criteria; and (ii) are made in the future or by written notice since July 1, 1978, will be eligible. Requests for Technological Improvements not immediately eligible for service as Industrial Firm Power will be served in the interim by Auxiliary Power.

d. *Allocation Among DSIs.* The contract will contain a mechanism for allocating TIA among DSIs in the event that requests in any year for the following 3-year period exceed the amount available for that period, with certain allocation priorities for those DSI's who have not previously been granted their proportionate share of available TIA amounts.

e. *Notice.* Same as for increases in utility contracts, except that shorter notice period may apply if the TIA is required by the DSI to comply with a governmental order (e.g., pollution control).

f. *Effect.* TIA that are granted will increase both Contract Demand and Operating Demand, and will decrease the Auxiliary Demand, by the amount of the TIA.

D. *BPA Restriction Rights.*

1. *Generally.*

a. The DSI contracts are required to provide reserves to protect BPA's firm obligations. These reserves are provided through contract rights to interrupt or withdraw power otherwise delivered to the DSIs. The restriction rights may not be exercised for any purpose other than the protection of all BPA firm obligations. Except to the extent of such restriction rights, BPA's contractual obligations to

the DSIs are generally identical to its obligations to other customers.

b. For purposes of quantifying specific restriction rights, each DSI Operating Demand is divided into four "quartiles" of equal size "subject to special operating circumstances." Different restriction rights apply to different quartiles. Additional restriction rights apply to Auxiliary Power.

c. The contracts will recognize that some flexibility in adjusting restriction rights over time will be desirable, and that such adjustments may be made by mutual agreement of the parties. In addition, the continued need for periodic Operating Agreements will be acknowledged.

d. Reserves are categorized as planning or operating reserves, depending generally on the purpose of the particular reserve, the duration of the restriction, and the type of shortage that "triggers" BPA's need for and right to exercise the restriction right.

2. *System Stability and Forced Outage.*

a. These reserves will be similar to existing DSI contract provisions. The main difference is that BPA seeks, in place of the present 5-minute limit on dropping 100 percent of the DSI load, a longer period (15-45 minutes). BPA is currently assessing its need for, and the DSI's their ability to withstand, this longer interruption.

b. These reserves are provided by the following specific restriction rights:

(1) *100 Percent Load Drop.* Extension of time limit from 5 minutes to 15-45 minutes is currently being investigated (see above).

(2) *50 Percent Load Drop.* This applies to the DSI loads operating at the time of restriction. A restriction is of up to 2 hours' duration each time employed. The accumulation of all such **[1493]** restrictions cannot exceed in kilo-

watthours in any calendar year each DSI's Contract Demand multiplied by 50.

(3) *25 Percent Load Drop.* This use applies to the second quartile of the Operating Demand. The accumulation of all such restrictions cannot exceed in kilowatthours in any calendar year each DSI's Contract Demand multiplied by 375.

3. *Top Quartile Operating Reserve.*

a. BPA may interrupt a portion of the DSI load, not to exceed 25 percent of the Operating Demand plus the Auxiliary Power, at any time, for any reason, and for any duration. Interruptions may be for capacity or energy or both. Special arrangements may apply when the first quartile is served with DSI firm energy borrowed from a later portion of a critical period.

b. As much notice of interruption as possible under the circumstances will be given.

c. See also "Operations In Lieu of Restriction", below.

4. *Second Quartile Reserves.*

a. The parties are presently negotiating the extent of the expanded reserve provided by this quartile. The DSIs maintain that this reserve should be only for resource delay and initial operating problems. BPA maintains that this reserve should also be used for failure of existing resources. It is agreed that this quartile will provide a reserve to protect BPA's other firm obligations.

b. Currently in disagreement are the following:

(1) *Inability of a Resource to Maintain Designed Capability Once Attained Initially.* BPA wants the second quartile reserve to be available not only to protect firm loads against the delayed completion of planned resources or the failure of such resources to achieve design capability but also to protest firm obligations against the contingency of the loss of capability of such resources once commercial

status is attained. The DSIs disagree, particularly if the "loss" is discretionary or volitional, and feel that all loads in the region (including the DSIs) should bear this risk equally in such event.

(2) *Coverage of Existing BPA Resources.* In addition to covering planned resources, BPA wants the reserve to be available in the event an existing resource loses actual capability; the DSIs take the position that only resources "implemented or acquired" by BPA under the Regional Act are to be covered. BPA agrees that such reserves for resources which attained commercial operation shall not be used because of shutdowns incurred under governmental orders.

(3) *Expansion of Second Quartile Reserves.* BPA wants to be able to restrict deliveries to the second quartile on short notice (30-45 days) during the operating year in which: (A) a long-term forced outage occurs, (B) firm loads cannot otherwise be served, (C) replacement energy cannot be purchased at a reasonable price, (D) first quartile reserves are unavailable and (E) forced outage reserves are insufficient. The DSI's maintain this would establish the second quartile as an operating reserve for energy purposes, which BPA states it needs. The DSIs maintain that this is a new proposal not contemplated by the Regional Act. The DSIs believe the intent of the Regional Act is to treat the second quartile as an energy planning **[1494]** reserve only, with notice of possible restriction therefor being given only prior to the Contract Year in which the restriction may occur. BPA believes that there is flexibility for expanded reserves.

c. The parties are currently considering provisions to attempt to resolve the disagreement expressed in subsections (a) and (b) above. The provisions would modify the proposed restriction right in the following manner:

(1) Provide assurances that the right will be exercised only in circumstances in which BPA would otherwise be unable to carry its firm obligations.

(2) Place a reasonable durational limit (or other form of limit) on the exercise of the restriction right, so that a forced outage that cannot be cured (or mitigated by purchases) will become within a reasonable time a regional problem rather than a problem for the DSIs alone. BPA proposes 180 days as a reasonable durational limit in the first Contract Year that the outage occurs, but maintains DSIs will continue to provide reserves for a period up to 10 years;

(3) Exclude from coverage by the restriction right certain types of events imposed by governmental action or which are voluntary, volitional, or otherwise discretionary (*e.g.*, a regional decision to shut down otherwise operable generating units); and

(4) Provide for contractual oversight provision with resource owners and operators to assure prudent operation of resources in order to minimize the risk of this restriction right being exercised.

d. The top quartile operating reserve and the DSI forced outage and stability reserves will be available for any contingency not covered by the second quartile reserve, including unanticipated growth of regional firm loads. The second quartile is not exposed to the extent the region simply fails to plan sufficient resources, but rather to the extent that certain planned resources are not available.

e. BPA recognizes its obligation to acquire resources pursuant to the Regional Act, on a reasonable schedule, to make up for any projected deficit.

E. *BPA Obligations and Operations in Lieu of Restriction.*

1. *Generally.* BPA is obligated to treat three quartiles of the DSI Operating Demand as a firm load for purposes

of both resource planning and operation (subject to the restriction rights noted above). BPA is obligated to treat the DSI top quartile as if it were a firm load for purposes of resource operation, but not for purposes of resource planning (subject to the restriction rights noted above). BPA may restrict deliveries to DSIs only for the purpose of making firm power sales to other customers. BPA will use techniques such as Advance Energy or shaping of Firm Energy Load Carrying Capability to borrow DSI firm energy from one time period for use in an earlier time period, subject to additional restriction rights by BPA if repayment of the borrowed energy is necessary to enable BPA to meet its firm obligations.

2. *DSI Load Obligations and Operations.* Because the DSIs' second quartile is a firm load for purposes of resource planning as well as operation, BPA will not restrict deliveries to the DSIs' second quartile unless BPA is unable to meet its total firm obligations in actual operation, including through the purchase of available power at reasonable price. BPA maintains that at present **[1495]** the price of power produced at single-cycle combustion turbines is the reasonable limit. The reasonable limit is expected to vary over time based on market conditions and other circumstances.

3. *Advance Energy.* Among the specific points that will be included in the DSI contracts with respect to Advance Energy are these:

a. Except for deliveries of Auxiliary Power, Advance Energy may be available for any portion of the DSI load that is subject to restriction, within the limits of available amounts.

b. Generally, Advance Energy will be pro-rated among the DSI on the basis of Operating Demands.

c. BPA proposes that if a DSI curtails plant load, it individually may refuse to accept Advance Energy, in whole or in part; the DSIs do not agree that Plant load must be curtailed to refuse acceptance of Advance Energy.

d. The obligation to repay Advance Energy will be discharged in proportion to the refill of the reservoirs at which Advance drafts were made, or to which Advance Energy was transferred, based on energy content of available storage at such reservoirs (taking flood control limits into account).

4. *Operating Agreements.* As is the case in the 1980-81 and 1981-82 Contract Years, BPA and the DSIs may from time to time enter into operating agreements for operations in lieu of restriction in the event the power sales contract does not provide for a particular operating condition. Such operations are secured by BPA rights to restrict in a later time period, if necessary, portions of the DSIs load that would not otherwise be subject to restriction under the terms of the DSIs contracts.

F. *Voluntary Curtailment by the Customer.* Each DSI may curtail its plant load up to the amount of the top quartile, plus Auxiliary Power, generally without a Demand Charge.

G. *Voluntary Termination of Contract.* The DSI prefer, as in section 11(c) of the existing DSI General Contract Provisions, that any DSI may terminate its BPA contract after a rate increase, subject to paying the cost of any BPA facilities used to deliver power to that DSI load. BPA has proposed that a DSI may terminate under such circumstances if the DSI reimburses BPA for the unrecoverable cost of pertinent facilities or resources acquired to serve the DSI, and of residential exchange shortfalls.

H. *Miscellaneous.*

1. *Service From Other Sources.*

a. If, with BPA's consent, any DSI transfers to a BPA utility customer any portion of the load that BPA is already serving directly, the Contract Demand and Operating Demand of that DSI will be reduced by the same amount.

b. As required by sections 9(i)(1) and (2) of the Regional Act, BPA will continue to act as agent for the DSIs in acquiring, at the request and expense of the DSIs, industrial replacement energy (IRE) and in disposing of such IRE at the request and expense of each DSI. BPA will prescribe the terms and conditions of IRE transactions for the purpose of assuring each DSI an opportunity to participate in such acquisitions and dispositions. In addition, BPA proposes (outside the power sales contract) that all acquisitions of IRE and other non-Federal energy by the DSIs shall be subject to preemption by BPA **[1496]** if the IRE has not already been delivered or advanced, and if it is needed to enable BPA to meet its firm obligations, including the DSIs second quartile; the DSIs have not agreed to this.

c. The DSIs propose that circumstances, if any, under which a DSI may acquire resources of its own to provide service to all or a portion of the load that BPA may interrupt should not be decided as part of the present contract negotiation. The DSIs maintain that this question should be deferred for resolution in the context of specific resource proposals if any are later advanced. BPA agrees that the matter can be deferred.

2. *Nongeneric Items.*

a. Alumax special provisions.

b. Furnace reline provision.

c. Rate and Restriction provisions for Hanna.

d. At-site provisions for Anaconda and Martin Marietta.

IV. *Discussion—General Contract Provisions.* The General Contract Provisions (GCPs) contain general provisions associated with the power sales contracts for utilities and direct-service industries. Specific information covered by these provisions include billing provisions, provisions for adjusting wholesale power rates, engineering requirements for points of delivery and many others.

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Leading to the Offering of Contracts
(8/27/81 - 9/3/81)

Volume IX

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Contract Official Record

1981

Department of Energy
Bonneville Power Administration

[2355]

Department of Energy
Bonneville Power Administration
Notice of Final Action Concerning
Power Sales and Residential Exchange Contracts
Required by Pacific Northwest
Electric Power Planning and Conservation Act

AGENCY: Bonneville Power Administration (BPA), Department of Energy

ACTION: Notice of final action concerning power sales and residential exchange contracts, including verbatim terms of the contracts, summary of major comments provided by the public, and BPA evaluation of the public comments.

SUMMARY: The Pacific Northwest Electric Power Planning and Conservation Act (Regional Act or Public Law 96-501) requires in section 5(g) that BPA simultaneously offer, within 9 months of the date of enactment (September 5, 1981), long-term power sales contracts to (1) existing public body and cooperative customers and investor-owned utility customers; (2) Federal agency customers; (3) electric utility customers participating in the residential exchange; and (4) the direct-service industrial customers. On Friday, August 28, BPA took final action concerning these contracts by sending final power sales and residential exchange offers to eligible entities in the Pacific Northwest. This action fully completed BPA's development of these contracts and satisfied BPA's statutory obligation to negotiate and offer these contracts pursuant to the requirements of section 5(g). Executed contracts may be amended in the future upon mutual agreement of the parties.

BPA published summaries of its draft prototype power sales and residential exchange contracts and a draft report on the environmental considerations associated with the contracts on June 11, 1981, (46 FR 31238). This Notice

summarizes the major issues identified by the public and BPA's evaluation of the public comments related to those issues which were received following publication of the draft prototype contracts and during earlier opportunities for public review and comment (46 FR 18331 and 46 FR 23287). This Notice also includes verbatim, in Attachments 1-3, the terms of the prototype Utilities Power Sales Contract, the prototype Residential Exchange Contract, and the prototype Direct-Service Industries Power Sales Contract, including the General Contract Provisions. Certain exhibits to the contracts have not been published because they have been previously published in the FEDERAL REGISTER or are included in this Notice only once where they are incorporated into more than one contract. References to where these exhibits can be found are included in the contracts where they are normally located.

FOR FURTHER INFORMATION, CONTACT: Donna L. Geiger, Public Involvement Coordinator, Bonneville Power Administration, P.O. Box 12999, Portland, Oregon 97212, 503-234-3361, Extension 4261. BPA maintains toll-free lines for the use of persons within the region. Oregon callers outside of the Portland area may use the toll-free line, 800-452-8429; for callers from Washington, Idaho, Montana, Utah, Nevada, Wyoming, and California: 800-547-6048. Messages received after normal business hours (after 4:30 p.m. and before 7:30 a.m.) may be recorded on the toll-freee lines. **[2356]**

SUPPLEMENTARY INFORMATION: The Regional Act requires that BPA simultaneously offer, within 9 months of the date of enactment, long-term power sales contracts to: (1) existing public body and cooperative customers and investor-owned utility customers; (2) Federal agency customers; (3) electric utility customers participating in the residential exchange; and (4) the direct-service industrial customers. From the outset, BPA recognized that the public should be and wished to be involved in the implementation of the Regional Act and could play an important role in

the negotiation of the power sales contracts. On December 1, 1980, BPA initiated its public involvement under the Regional Act by mailing to 8,000 addressees in the region a summary of the Regional Act, a series of questions and answers relating to the Regional Act, a summary of the tasks which BPA planned to undertake for implementing the Regional Act, and an announcement of the availability of toll-free numbers for questions. The Administrator announced in that mailing that four technical meetings would be held in Portland in mid-December for interested parties (investor-owned utility customers; direct-service industrial customers; preference customers; and Federal agency customers; and environmental and consumer organizations). The purpose of these meetings was to explain the Regional Act and the actions which BPA must undertake prior to adoption of an initial regional power plan by the Pacific Northwest Electric Power and Conservation Planning Council (Regional Planning Council) established by the Regional Act.

On December 5, 1980, the Administrator sent letters to each customer group and to other interested individuals and groups telling them where and when the technical meetings would be held. Principal environmental and public interest groups, local government bodies, and Northwest Indian tribes were included in this mailing.

On December 31, 1980, the Administrator sent informational material regarding the upcoming negotiations to all customers and technical meeting attendees. The material included lists of the contract types as well as the task teams BPA proposed to negotiate the contracts.

On January 5, 1981, BPA issued a press release announcing a series of 26 town hall meetings to be held throughout the region from January 8 through 22. (An additional meeting was scheduled later when a particular community requested that one be held in that locality.) BPA placed advertisements concerning the meetings in regionwide

newspapers in order to reach the maximum number of interested people. The meetings were designed to explain the major provisions of the Regional Act to the public and especially local government officials. They were conducted by BPA Area office and District office personnel. The Administrator stated that the town hall meetings were one way BPA would keep the public informed and involved during the policymaking process.

On January 12, 1981, BPA announced to its customers that an organizational meeting for contract negotiations pursuant to the Regional Act would be held on January 23 in Portland. On January 14, a direct invitation to attend the meeting was also extended to interested individuals through the press and mailings. On January 20, BPA issued a press release to further alert the public on the upcoming organizational session. This meeting preceded the start of actual negotiations. Its main purpose was to develop the [2357] organizational framework within which negotiations would be conducted and to determine the mechanics of the development of the specific prototype contracts. BPA invited its customers to select representative teams to attend the meeting.

From January 23 to May 29, negotiations between BPA and its customers were conducted at BPA headquarters in Portland, Oregon. Early in January, BPA's Public Involvement office established a weekly meeting calendar. The calendar included conferences, seminars, and other meetings including contract negotiation sessions and was sent to the public on request. Similar information was contained in calendars maintained and distributed throughout the region by the Public Power Council, the Pacific Northwest Utilities Conference Committee, and the Direct-Service Industrial Customer office. The section of the calendar dealing specifically with the contract negotiation sessions was reproduced and posted every Monday in the BPA Headquarters lobby. It was also included in the weekly mailings

of negotiation materials to individuals who requested these materials.

Issues regarding the power sales and rural-residential exchange contracts were discussed and clarified in the negotiating sessions. Interested individuals were free to observe the negotiation sessions between BPA and participating parties, and to submit oral and written comments during and at the conclusion of individual negotiating sessions. Upon request, BPA each week furnished to the public copies of all documents distributed at the sessions.

On March 25, 1981, BPA published a notice in the FEDERAL REGISTER (46 FR 18331) titled "Notice of Public Participation in Negotiation of Initial Long-Term Power Sales and Certain Other Contracts." The notice outlined the approach BPA was taking to include the public in the contract negotiation process and restated the availability of the meeting calendar so that interested parties could attend the negotiated sessions. It also invited interested individuals to request weekly mailing of documents distributed at the negotiation sessions so that individuals unable to attend some or all of the negotiation sessions would still be able to participate. This invitation to participate in the sessions was also mailed directly to individuals and groups who had expressed an interest.

On April 8, 1981, in response to urging from fisheries and environmental groups for expanded public involvement, BPA announced its plans to hold two evening meetings (one west of the Cascades and one east of the Cascades) where the Acting Power Manager would receive advice and accept comments from interested people on contract issues identified by them. The letter directed to "Public Interest Groups and Individuals Particularly Interested in BPA's 1981 Contract Negotiation Process" requested their help in identifying items for the meeting agenda and their suggestions for the specific location.

On April 24, 1981, BPA mailed letters to over 3,000 public interest groups and individuals stating that it would hold two public meetings in May to receive advice and accept comments on items of concern that had been identified in response to the April 8 letter. These evening meetings, held in Seattle, Washington, and Boise, Idaho, were announced in the FEDERAL REGISTER (46 FR 23287). The invitation was also extended to BPA customers. **[2358]** Congressman Ron Wyden (D - Or) and Acting Administrator Earl Gjelde issued a press release announcing the public meetings and the opportunity to submit written comments for contract items. An additional meeting, a special evening session with BPA's negotiating teams held in Portland, was later announced. This additional opportunity to comment on matters to be dealt with in the contracts was publicized in newspaper advertisements in the vicinity of the meeting locations. Over 300 people attended these public meetings which were recorded and transcribed. BPA representation included the Acting Power Manager, the Power Management Chief of Staff, five Division Directors in their role as principal negotiators, the Contract Negotiations Branch Chief, the Conservation Division Director, and the Fish and Wildlife Coordinator as well as Public Involvement, Environmental, Area office, and District staff. BPA contract leaders were also present at the Portland session. Attendees were given a brief written explanation of the contracts as they registered. Forty-one people presented statements at the Seattle and Boise meetings, and 19 people commented at the special evening session held in Portland.

On June 8, 1981, BPA sent summaries of the testimony received at the three public meetings and the written comments received through May 29, 1981, to meeting attendees as well as others who had indicated an interest in the contract negotiation process. The transcripts of the meetings and the summaries were also given to the various negotiating parties.

The Administrator issued a press release on May 13, 1981, announcing the remainder of the schedule for the negotiations. On June 11, 1981, BPA again contacted by mail those interested in the contract process advising them concerning the availability of draft prototype power sales and residential exchange contract, together with a draft report on associated environmental considerations. The FEDERAL REGISTER notice (46 FR 31238) sent with the letter announced a 30-day review-and-comment period ending July 13, 1981, and contained a summary of the significant elements of the draft contracts and of the major points of disagreement, as well as a notice of availability of a draft environmental report. The notice also advised interested parties of four public meetings scheduled in Seattle, Spokane, Portland, and Boise where they could comment orally on the draft contracts and environmental report. An additional public meeting was later scheduled and announced in Missoula, Montana. The meetings were publicized in newspaper advertisements in the localities, and were conducted by BPA Area office and District office personnel. The meetings were recorded and transcribed. The transcripts of the meetings and summaries of the testimony and written comments received through July 2, 1981, were given to the negotiating parties and those who had requested copies of all material distributed at the negotiating sessions.

As announced, written comments could be submitted through July 13, 1981. The comments which were received by July 13, 1981, from the public at large and from those who would be contract signators were read by a representative group of BPA, the Inter-Company Pool, the Public Power Council, the Direct Service Industries, and members of the public. BPA then began its formal in-house review and assessment of the comments submitted. The issues raised by the public comments and BPA's evaluation of these comments are explained below.

BPA's customer comments have also been read, analyzed, and considered. It is BPA's position that the contract itself is BPA's final response to the issues as they have evolved during the negotiations process. Therefore, BPA has decided not to respond in this evaluation to each and every issue raised by its customers. BPA feels that the eight months of negotiations have provided the forum in which its customers could express their views on the issues. BPA has also responded directly to its customers in the negotiations process.

In order to respond fully to its customers, regarding those issues that remained unclear or unresolved at the end of the negotiations process, BPA set aside the week of August 3-7, at the Jantzen Beach Red Lion in Portland, Oregon, to discuss and resolve those issues. This was an intensive week of meetings directed at issue resolution. BPA attendees included the Administrator, Deputy Administrator, members of General Counsel's staff, plus the BPA negotiating teams. The week culminated on Friday, August 7, in sessions between BPA and each customer class, at which time the Administrator and Deputy Administrator reviewed the issues, reviewed the week's discussions and where possible stated the resolution of the issues as understood by BPA at the end of the negotiating process. The customers then responded, and a discussion of the issues followed. The week of the negotiations and the Friday review allowed all parties to have a clear understanding of the status of the issues on the final day of negotiations.

On Friday, August 28, 1981, BPA took final action on the proposed contracts by sending its offerial contract offers to eligible regional entities. Final utility power sales offers were sent to regional publicly-owned and investor-owned utilities, specific Federal Agencies, and current direct-service industrial customers. Final residential exchange

contract offers were sent to utilities which had requested residential exchange contracts.

On and after September 14, 1981, BPA will make available to the public for inspection and copying the Official Record of this process, including the Administrator's Record of Decision and the Final Environmental Report and BPA's Staff Evaluation of Public Comment listing the comments of individual commentators on the major issues.

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1981

Department of Energy

Bonneville Power Administration

[2640]

Staff Evaluation of Public Comments in Response to BPA's Prototype Power Sales Contracts and Residential Purchase and Sale Agreement

Prepared by
Bonneville Power Administration
U.S. Department of Energy
August, 1981

* * *

[2686]

VII. Direct Service Industry Power Sales Contract: The Major Issues Identified and Addressed by the Public and BPA's Evaluation of those Comments

A. FISH AND WILDLIFE LANGUAGE

1. *Issue:*

Should language addressing BPA's and its customers' fish and wildlife responsibilities under the Regional Act and other laws be included in all Power Sales Contracts and exchange contracts?

2. *Comments:*

Public comments in summary form on this issue follow:

Columbia River Inter-Tribal Fish Commission, 7/13/81.

Shifting FELCC and use of Advance Energy to serve the DSI First Quartile may conflict with anadromous fish migrations (p. 4).

Fair Electric Rates Now, 7/14/81.

Contract provisions requiring prudent conservation of energy in excess of critical planning amounts for First Quartile service should specify that such conservation is subordinate to fish and wildlife obligations (p. 16).

The contract section dealing with fish and wildlife obligations should specify that such obligations take precedence over First Quartile service (p. 17).

The Second Quartile should be restrictable for fish and wildlife obligations (p. 16).

Washington Environmental Council, 7/10/81.

Section 7(c)(2) of the DSI draft should specify that resource acquisitions to serve the DSI First Quartile with shifted FELCC should not conflict with fish and wildlife obligations (p. 5).

The provision of section 7 of the DSI draft requiring Bonneville efforts to avoid reductions in generating capability should clarify that it cannot be used to avoid fish and wildlife obligations (p. 5).

The provision of section 7 of the DSI draft requiring Bonneville to acquire resources before imposing a Second Quartile restriction should be made contingent on fish and wildlife obligations (p. 5).

Operations to serve the First Quartile should be limited by fish and wildlife obligations. There should be a limit on the amount of Advance Energy that can be made available in order to protect fish. Bonneville commitments requiring return of Advance Energy should include fish and wildlife, especially for fish flows (p. 5).
[2687]

The Fish and Wildlife section should refer to sections 2 and 10 of the Regional Act (p. 6).

The Firm Obligations definition should provide that reserves for firm power customers not be detrimental to fish and wildlife, and should be made subject to environmental review (p. 6).

Evergreen Legal Services, 7/10/81.

The improved power quality of the First Quartile could sacrifice fish and wildlife values (p. 5).

Provisions for restriction for salmon and steelhead should be added (p. 5).

Natural Resources Law Institute, Lewis and Clark Law School, (Attachment, Anadromous Fish Law Memo), 7/9/81.

Enhanced service to the First Quartile may preclude Bonneville compliance with its fish and wildlife obligations (p. 5).

The Mid-Term Contract Review, Second Quartile restrictions, and FELCC shift provisions in the DSI draft

allow deeper reservoir drafts to the detriment of fish (p. 8).

Pacific Northwest Resources Clinic, University of Oregon Law School, 7/13/81.

First Quartile service should be conditioned on meeting fish and wildlife obligations (p. 31).

Conservation of energy in excess of critical planning amounts for First Quartile service should be conditioned on meeting fish and wildlife obligations (p. 33).

Shifting FELCC to serve First Quartile will have adverse impacts on fish and wildlife and should be conditioned on meeting fish and wildlife obligations and the concurrence of Federal and state fish and wildlife agencies and consistency with the Regional Plan (p. 31-32).

U.S. Department of Commerce, National Marine Fisheries Service, 7/13/81.

The section 7 provision of the DSI draft requiring Bonneville best efforts to avoid any reduction in resource generating capability appears to potentially conflict with operating a resource to comply with fish and wildlife obligations (p. 6).

DSI draft provisions calling for an FELCC shift for First Quartile service are improper because there is no limitation on Bonneville's discretion to shift, because it is unclear how such a shift would impact Corps of Engineers and Bureau of Reclamation reservoir operation, including for nonpower uses, and because shifting FELCC to serve First Quartile in a dry year can conflict with fish and wildlife needs. NMFS suggests incorporating fish flows in FELCC rule curves (pp. 6-7).

[2688]

William B. Culham, 5/6/81.

3. *Evaluation*

BPA's service to the DSIs will fulfill BPA's obligations to protect, mitigate, and enhance fish and wildlife, while

assuring the Region an adequate, efficient, economical, and reliable power supply. Those obligations are reaffirmed in section 11 of the DSI contract.

Furthermore, in the General Environmental Provision in the General Contract Provisions applicable to all Power Sales Contracts, the parties agree to "comply fully with all applicable Federal, State, and local environmental laws." Service to the First and Second Quartiles is subject to these provisions, by law, and as reaffirmed in the contract.

Current planning considers spills required for fish flows in critical rule curves. The hydro-system is available for multiple uses, and although shifting FELCC and Advance Energy will draw down reservoirs faster than if those actions did not occur, fish and wildlife are considered in those actions.

The Corps of Engineers has participated actively in determining the method of serving the First Quartile. The method that has been chosen, as stated in the August 14 letter referred to in the contract, is more acceptable to the Corps than a full-year shift or 6-month shift to FELCC because of the reduced impact on reservoirs. Furthermore, the agreement with the Corps and the Bureau of Reclamation for drafting reservoirs to provide Advance Energy is premised on the fact that such drafts do not have a major adverse impact on nonpower uses. Thus, concern for fish and wildlife has had a significant impact on BPA plans to operate to serve the First Quartile.

The Second Quartile has not been restrictable for fish and wildlife obligations in the past. There is Congressional direction that the DSIs should receive an equivalent amount of power to the amount they received under their IF agreements. If the Second Quartile, being a BPA firm load, is restrictable for fish and wildlife obligations, then all firm loads, including utility loads, should also be restrictable for fish and wildlife obligations.

Sections 2 and 10 of the Regional Act do not speak as directly to BPA's fish and wildlife obligations as does section 4, and therefore, those sections were not mentioned in section 11 of the DSI contract.

* * * *

[2692]

C. *IMPROVED DSI POWER QUALITY*

1. *Issue:*

Is improved power quality for the DSI First Quartile required by the Regional Act or in contravention of it?

Are there unfavorable consequences to the Region as a result of improved DSI power quality?

Should First and Second Quartile restriction rights be greater than they are in the contract draft?

2. *Comments:*

Public comments in summary form on these issues follow:

Fair Electric Rates Now (Attachment, Jim Lazar), 7/13/81.

The DSI draft allows the DSIs higher First Quartile power quality than is mandated by the Regional Act. The legislative history indicates that Bonneville should have more flexibility in imposing restrictions, not less (pp. 13-14).

The DSIs are paying rates for interruptible power but getting a firm contract. The DSIs should be charged a higher rate for First Quartile power (p. 13).

The limitation on the 25 percent Forced Outage and Stability Reserve should be eliminated (p. 16).

Delete the 180-day limitation for restriction due to forced outage of an operating resource during a Contract Year (p. 17).

DSIs should not have access to preference customer power for service above Contract Demand levels (p. 1).

Bonneville should only obligate itself to use best efforts to acquire resources for offering follow-on contracts (p. 17).

Fair Electric Rates Now (Attachment, Jim Lazar) 7/13/81.

Conservation of energy in excess of critical planning amounts for First Quartile service should be subordinate to the requirement of the Regional Plan (p. 16).

Idaho Consumer Affairs, Inc., 7/13/81.

Opposes "interruptibility credit payments." DSIs should bear risk of failed resources. They are paying low rates yet getting high quality power. Bonneville should provide for restriction of DSI loads during Regional insufficiency. Acquisition of single cycle combustion turbine resources to serve DSI loads will be paid for by by Regional ratepayers (p. 3).

[2693]

Evergreen Legal Services, 7/10/81.

Use of shifted FELCC and Advance Energy to serve the First Quartile will decrease Bonneville's ability to meet load (p. 5).

Natural Resources Defense Council, Inc., 7/13/81.

DSI First Quartile power quality should not be improved. Such improved service contravenes the Regional Act. Bonneville reliance on Appendix B to the Senate Report is tenuous (pp. 23-24).

Pacific Northwest Resources Clinic, University of Oregon Law School, 7/13/81.

The DSI draft improves First Quartile power quality in contravention of the Regional Act (pp. 35-39).

First Quartile restriction rights should be 25 percent of Contract Demand, not Operating Demand (p. 39).

Shifting FELCC for First Quartile service increases chances of Regional curtailment (pp. 40-41).

The DSI draft obligating Bonneville to purchase gas turbine energy to serve the portion of the First Quartile served with shifted FELCC contravenes section 9(i)(1) of the Regional Act (pp. 41-42).

No Bonneville obligation to acquire resources before imposing a Second Quartile restriction existed in the previous contracts; such an obligation should not now be adopted (p. 43).

It is inappropriate not to restrict Second Quartile for lack of appropriated funds (p. 43).

Requiring Bonneville's best efforts to avoid reductions in generating capability could put it in the position of unnecessarily or improperly fighting legal battles on behalf of the DSIs (p. 44).

Oregon Department of Energy, 7/14/81.

Bonneville's plan to purchase resources to serve the First Quartile is not required by law (pp. 9-10).

Washington State Energy Office, 7/10/81.

Service to the First Quartile with shifted FELCC imposes a risk of Regional shortage because DSI return obligations are not based on need. DSI First Quartile service with shifted FELCC should be tied to nonconditional recall rights (pp. 1-2).

Washington Utilities and Transportation Commission, 7/10/81.

Shifting FELCC for First Quartile service should be deleted because it could result in Regional curtailments (p. 2).

John C. Neely, Jr., 4/30/81.

Service to Alumax is an uneconomical and unecological use of electricity and will require acquisition of expensive resources (pp. 1-5).

3. *Evaluation*

Section 5(d)(1)(B) of the Regional Act provides that each DSI shall receive "an amount of power equivalent to which such customer is entitled under its contract for . . . the sale of industrial firm power existing at the passage of the Regional Act." The contracts provide for a single class of power and divide service into four approximately equal "quartiles." BPA plans to develop and acquire firm resources to serve 75 percent of the DSI load as firm and serve the top quartile or additional 25 percent, ". . . as if it were firm." (S. Rep. 96-272, 96th Cong., 2d Sess. 59 (1979)). This is characterized in section 8(a)(1) of the BPA-DSI contracts, "as a firm load for purposes of resource generation only."

BPA characterizes top quartile service as "quasi-firm," having undeniable firm characteristics and served by operating resources to provide a power quantity with firm characteristics, while not installing resources to meet it on an absolutely firm basis. The Regional Act provides a clear statutory basis for service in this manner. By section 5(d)(1)(A), sales to DSI's are "to provide a portion of the Administrator's reserves for firm power loads . . . ." The term "reserves," as defined by the Regional Act, means "the electric power needed to avert particular planning or operating shortages for the benefit of firm power customers. . . ." Section 3(17). In other words, service to the top quartile cannot be restricted to provide service to nonfirm loads or to make sales of nonfirm energy.

Any suggested ambiguity from the section 5(d)(1)(A) reference to DSI sales as "[s]uch sales," (i.e., whether it

refers to three quartiles of nondisputed firm or treats the top quartile as quasi-firm) is resolved by the Regional Act's legislative history. The Senate Energy Committee Report directs BPA to plan and develop " 'firm' resources under critical streamflow conditions to carry 75 percent of the total DSI requirement," with the additional 25 percent, or "top quartile," to "be served with resources which are in excess of critical planning amounts but operated to meet the entire DSI load as if it were firm." S. Rep. No. 272, 96th Cong., 2d Sess. 59 (1979). In addition, the House Interior Committee Report states that:

> "Sales to existing DSI's are required to provide a portion of BPA's power system reserves . . . The DSI's will provide two types of energy reserves. Approximately 25 percent of the DSI load is to be treated as a firm load for purposes of resource operation and will provide an operating reserve which may be restricted by BPA at any time in order to protect the Administrator's firm loads within the region . . . An additional 25 percent of the DSI load will be treated as firm load for both planning and operating purposes and will provide a planning reserve to protect the Administrator's firm loads . . . ."

[2695]

Senators Jackson and McClure, the past and present Chairmen of the Senate Committee on Energy and Natural Resources, have concurred that the House Interior Committee Report reflects the accurate position of the Senate on the "reserves" question. See 126 Cong. Rec. 14691 (daily ed. Nov. 19, 1980) (remarks of Senator Jackson) and *Id.* at 14698 (remarks of Senator McClure).

The DSIs play a vital part in the Regional power scheme. DSI revenues will pay the costs of the residential exchange through June 1985. After June 1985, DSI revenues will continue to be important. The DSIs alleviate the need for

BPA to acquire additional expensive generating resources for reserves. Improved first quartile DSI power quality will generate additional revenues.

Both restrictions and operations were extensively debated among BPA customer groups before the final provisions were adopted. The provisions adopted are intended to provide the DSIs with the power quality required by law with minimum cost and minimum adverse impacts on other customer groups.

The "August 14 letter" operating plan, which serves as a safety net for first quartile operations, minimizes shift of FELCC from later Critical Period years for first quartile service, thus reducing reservoir drawdown over the Critical Period and adverse impacts on other systems. This plan would serve as the basis for first quartile operations throughout the contract term, and could only be replaced with a plan with equivalent risks and benefits to the DSIs and BPA. Furthermore, service with Advance Energy is maintained, which is returnable based on need in the same Contract Year, improving chance of refill. The August 14 letter also provides for borrowing FELCC from later in the same Contract Year, with return provisions tied to need later in the same year, again improving chances of refill. These methods of serving the first quartile, shifting and borrowing FELCC and Advance Energy, along with pre-Critical Period surplus energy early in the Contract Year, are all limited to the date that the first reliable runoff forecast is available, presently January 10. After that date, the first quartile would be served with water in excess of critical planning amounts.

BPA has generally retained the same restriction rights it had in the previous contracts with the exceptions of improved first quartile power quality and additional second quartile restriction rights for failure of an operating resource. The DSI second quartile would provide a reserve

for one-half of such an outage for seven years. Forced outage and stability reserves have been increased slightly. Availability credits are no longer provided for, which the House Interstate and Foreign Commerce Committee Report on S. 885 at page 62 noted had reduced BPA flexibility.

The BPA obligation to acquire resources to serve the DSI load is limited to acquiring resources for 75 percent of their load. BPA is obligated to purchase resources that are reasonably priced and legally available to serve the part of the first quartile served with shifted FELCC. This is because that shifted FELCC comes from the DSI third quartile of later Critical Period years, which is part of the DSI load for which BPA is obligated to acquire resources before making the subsequent third quartile restriction. Because BPA is obligated to treat the second quartile as part of its firm load for resource acquisition purposes, there is also an obligation to acquire legally [2696] available, reasonably priced resources before imposing or continuing a second quartile restriction.

The "legally available" qualification means that such resources can only be acquired consistent with BPA's cost effectiveness obligations established in the Regional Act for long-term acquisition, and other provisions including environmental criteria. The term "reasonable cost" does not require BPA to acquire single cycle gas turbine energy, unless BPA determines that such energy is reasonably priced at the time of the acquisition.

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Leading to the Offering of Contracts

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[2800]

Environmental Report
Environmental Review of the Issues and Alternatives
Associated With the Offering of the Power Sales
and Residential Exchange Contracts Required
Under the Pacific Northwest Electric Power Planning
and Conservation Act (Public Law 96-501)

September 1981
Bonneville Power Administration
U.S. Department of Energy

[2854]

* * *

4.2 DSI Resource Acquisitions

4.2.1. *Explanation of Issues and Alternatives*

The question of whether BPA's DSI customers are authorized to independently acquire resources to serve that portion of their top quartile not otherwise served by BPA ("topping off" resources) has been discussed during the negotiations but is not addressed in the power sales contracts. Instead, specific DSI resource proposals will be dealt with individually under separate contracts.

Some DSIs expressed interest in acquiring resources to assure themselves of essentially firm service in the event of BPA restrictions to their top quartile of contract demand. Their position was based on the economics of operation. This applies, principally, to the costs of shutting down aluminum reduction cells or "pots," and losing production when top quartile service is restricted. The argument was that the amount of power needed to continue service is frequently minimal; that is, the megawatthours made available by BPA to the DSIs sometimes fall just short of what is necessary to keep production ongoing. The DSIs which sought to acquire their own resources maintained that the development of "topping off" resources therefore made economic sense. The DSIs also maintained

that they could independently construct such resources as a matter of law, and that nothing implicit in their receiving service from BPA impinged on this authority.

BPA viewed the matter from a different perspective and believes that for several reasons the DSIs should not acquire "topping off" resources. First, under the Regional Act, the DSIs sought and achieved a significantly improved service: ". . . a quantity of power . . . based on the proportion of total industrial requirement, on a long-term average (currently estimated to be between 85 and 96 percent of the total DSI load)" (Senate Report 96-272, p. 59). There is no showing that where the DSIs elect to receive service from BPA, they should also be able to independently acquire their own resources. This is particularly true where construction of such resources could adversely impact BPA's own ability to acquire resources to meet its own power supply responsibilities. This could occur if state siting councils or others with **[2855]** authority to license projects based on resource need concluded that regional resources were adequate because of DSI generation. However, because DSIs are not utilities and have no utility responsibility, there would be no assurance that other BPA customers and their consumers would have access to them during the period of greatest need—critical water.

Finally, BPA also has a strong concern regarding equity in treatment of all customer classes. BPA will be serving the DSIs under the Regional Act with an improved quality of power. This Congressionally mandated improvement in quality of service will result in less secondary or nonfirm energy being available for other customer classes. BPA does not believe that the DSIs should receive both higher quality of power and be able to build resources which are needed only during infrequent periods of restriction, while also displacing those resources to their economic advantage whenever possible.

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[3798]

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[7(e)] *Third Quartile Restriction Rights.*

(1) Bonneville may restrict deliveries of Industrial Firm Power to the Purchaser to serve its Third Quartile load during a Contract Year, subject to the provisions of paragraph (5) below, up to the amount of electric energy evidenced by:

(A) the greater of the outstanding debits in the Purchaser's Delivered FELCC Account or the Pruchaser's applicable Shifted FELCC Account, if, for such Contract Year, the FELCC is established from the last Contract Year of a Critical Period; or

[3799]

(B) the lesser of the outstanding debits in the Purchaser's Delivered FELCC Account or the Purchaser's applicable Shifted FELCC Account, if, for such Contract Year, the FELCC is established from other than a last Contract Year of a Critical Period.

(2) Simultaneously with any actual restriction in a Contract Year for which FELCC is established from the last Contract Year of a Critical Period Regulation pursuant to subparagraph (1)(A) above, Bonneville shall publicly call for a region-wide voluntary curtailment of non-essential uses of electric energy, and shall include in its region-wide appeal the information that Bonneville's ability to continue to meet its Firm Obligations depends on such voluntary curtailment as well as on actual restrictions of the Purchaser's load hereunder. All such appeals shall be repeated at regular intervals during any period when actual restrictions hereunder remain in effect.

(3) If during a Contract Year Bonneville borrows FELCC from later months of such Contract Year and uses such borrowed FELCC to serve the Purchaser's First

Quartile load, Bonneville may restrict deliveries of Industrial Firm Power later in such Contract Year up to 25 percent of the Purchaser's Operating Demand. Such restriction shall not exceed the lesser of (A) the amount of energy delivered to the Purchaser as borrowed FELCC, or (B) the Purchaser's share of the amount of energy by which Bonneville is otherwise unable to meet its Firm Obligations during such Contract Year by reason of the borrowed FELCC during such Contract Year.

[3800]

(4) Bonneville shall use its best efforts to store and conserve water and energy associated therewith in order to avoid or to reduce the Purchaser's exposure to restriction pursuant to paragraphs (1) and (3) above.

(5) The total of restrictions pursuant to this subsection shall not exceed in any case the lesser of:

(A) 25 percent of the Purchaser's Operating Demand less the amount of the Purchaser's Third Quartile load curtailment pursuant to section 9(c); or

(B) the Purchaser's share of the amount of energy by which Bonneville is otherwise unable to meet its Firm Obligations, by reason of the borrowed or Shifted FELCC, after using its full FELCC, including the operation or replacement of all the resources included therein.

(6) Bonneville shall not restrict the Purchaser's Third Quartile load for the purpose of selling nonfirm energy under the NF-1 rate schedule, its successor, or any other rate schedule. Bonneville shall not be obligated to plan for or acquire resources to alleviate a Third Quartile restriction pursuant to this subsection, but Bonneville will treat the Purchaser's Third Quartile load as a firm load for purposes of resource operation.

* * * *

[3807]

[§ 8(a)(2)] Bonneville will meet the foregoing obligation while retaining the restriction rights set forth in this contract. Nonfirm energy will not be sold under the NF-1 rate schedule, its successor, or any other rate schedule if, in Bonneville's sole determination, such energy could be prudently conserved for service to the Industrial Purchasers' First Quartile loads.

* * * *

[3822]

[8(c)(9)] To the extent that Bonneville sells nonfirm energy in accordance with the provisions of this contract using water which could have been stored or conserved for purpose of avoiding or reducing the Purchaser's Advance Replacement Energy obligation, Bonneville shall acquire or recall any electric energy which it is legally authorized to acquire or recall, and which is available at a Reasonable Cost, before requiring delivery of Advance Replacement Energy.

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* * *

1.4 *INDUSTRIAL FIRM POWER:* Industrial firm power is power which the Administrator will make continuously available to a purchaser on a contract demand basis subject to:

a. the restriction applicable to firm power, and

b. the following:

(1) The restrictions given in section 8, "Restriction of Deliveries," of the General Contract Provisions (Form IND-18) of the contract.

(2) When a restriction is made necessary because of the operation of generating or transmission facilities used by the Administrator to serve such purchaser and one or more firm power purchasers is suspended, interrupted, interfered with, curtailed or restricted as a result of the occurrence of any condition described in the Uncontrollable Forces or Continuity of Service sections of the General Contract Provisions of the contract, the Administrator shall restrict such purchaser's contract demand for industrial firm power to the extent necessary to prevent, if possible, or minimize restriction of any firm power. When possible, restrictions of industrial firm power will be made ratably with restrictions of modified firm power based on the proportion that the respective contract demands bear to one another. The extent of such restrictions shall be limited for modified firm power by section 1.2(b) of the General Rate Schedule Provisions and for industrial firm power by section 8 of the General Contract Provisions of the (Form IND-18) contract.

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Correspondence and Comments on

Contract Items
(Jeep thru Wolf)

and Correspondence and Comments Received

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Department of Energy

Bonneville Power Administration

[8406]

Letter from the

Public Generating Power Pool

Chelan Co PUD

Cowlitz Co PUD

Douglas Co PUD

Eugene Water & Elec Bd

Grant Co PUD

Seattle City Light

Tacoma City Light

Division of Power Management

No. 1-241 Date 7-13-81

July 13, 1981

Ms. Donna L. Geiger
Public Involvement Coordinator
Bonneville Power Administration
P.O. Box 12999
Portland, Oregon 97212

Dear Ms. Geiger:

The majority of the member utility systems of the Public Generating Pool; Public Utility District of Snohomish County; Central Lincoln Peoples' Utility District, Clatskanie Peoples' Utility District, Northern Wasco Peoples' Utility District and Tillamook Peoples' Utility District submit the following comments in response to the Bonneville notice in the Federal Register of June 12, 1981 at page 31,238. The Public Generating Pool members commenting herein are the Eugene Water & Electric Board; Public Utility District No. 1 of Chelan County; Public Utility District No. 1 of Cowlitz County; Public Utility District No. 2 of Grant County; the City of Seattle, Light Department; and, the City of Tacoma, Department of Public Utilities.

Most of the comments of these parties concern the Contract Elements for the Bonneville contracts with the Direct Service Industries (DSI's) and the proposed prototype DSI contract dated June 8, 1981 and a later draft dated July 2, 1981. The status of this July draft as a Bonneville proposal is unknown.

* * * *

[8409]

7(c) *First Quartile Restriction Rights*

Both the June 8 and July 2, 1981 proposed drafts for section 7(c)(2) require Bonneville to either acquire or recall electric energy before restricting the first quartile. This requirement may result in forcing a restriction of a utility firm load in order to serve the DSI nonfirm top quartile. Such a result would violate the preference and priority sections of the Bonneville Act and the Regional Act.

Section 7(c)(3) of the contract drafts of June 8 and July 2, 1981 may be claimed to give the DSI's priority to all energy generated by water in excess of critical water planning to serve the top quartile. Under the Regional Act the top quartile is to be restrictable. This proposed provision could result again in service to DSI nonfirm loads to the detriment of regional utilities' firm loads. An occurrence of drought conditions could be disastrous to preferences agencies.

For example, in 1973, near drought water conditions existed throughout the Pacific Northwest with especially critical water conditions for west Cascade reservoirs. As a result, resources of computed demand preference customers, such as the City of Seattle and the City of Tacoma fell below their assured capability projections. Short-term energy purchases were required. Since some secondary energy was then available on the BPA system, purchasers were made from federal resources by these two preference customers.

Under the proposed contract language, however, this secondary energy would be made available first to serve the top quartile of the DSI load. Thus, while a nonfirm industrial load would continue to be served with federal preference power, firm loads of publicly owned utility

systems would either be curtailed on an emergency basis or impacted by outside regional thermal purchases, if available, requiring imposition of draconian surcharges. Such was the case in 1977.

* * * *